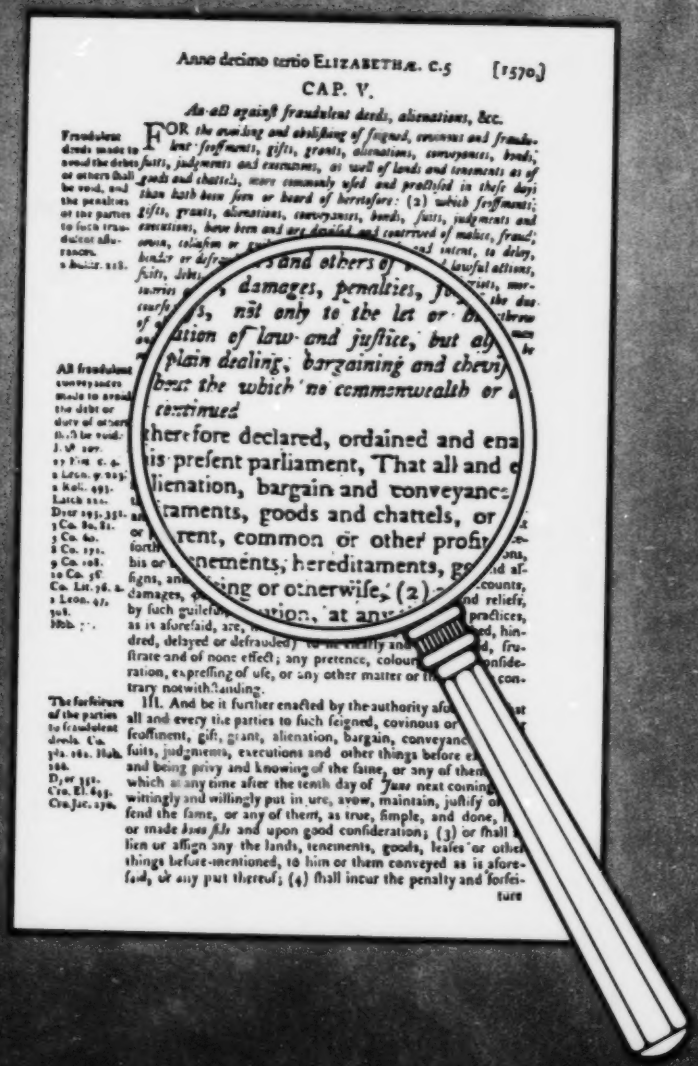
Law Reform Commission of Saskatchewan

PROPOSALS FOR A NEW PERSONAL PROPERTY SECURITY ACT

Report to the Minister of Justice

Saskatchewan


Anno decimo tertio ELIZABETHÆ. c.5 [1570.]

CAP. V.

An act against fraudulent deeds, alienations, &c.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, mortuaries and heriots, to the great disherison of the true owners of such lands, tenements, goods and chattels, not only to the let or hindrance of the due execution of law and justice, but also in many cases to the overthrow of all true plain dealing, bargaining and chevisance between man and man, whereby any bargain is made, but the which no commonwealth or

continued

therefore declared, ordained and enacted by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or any rent, common or other profit out of the same, by writing or otherwise, (2) and all leases, rents, commons or other profits of or in any lands, tenements, hereditaments, goods and chattels, or any of them, and all bonds, specialties, suits, debts, accounts, reckonings, damages, penalties, forfeitures, actions, executions and reliefs, by such guileful means as aforesaid, at any time had or made, or hereafter to be had or made, and all and every other act, practices, and devices, as is aforesaid, are, and shall be, from henceforth, utterly void, frustrate and of none effect, as against the said lord the queen, her heirs and successors, and every of them, and also as against all and every other person and persons, bodies politic and corporate, whose actions, debts, suits, accounts, damages, penalties, forfeitures, mortuaries, heriots, rents, commons, profits, possessions, reversions, remainders, inheritances, rights, titles, interests, leases, liberties, privileges, jurisdictions, franchises, and other hereditaments, by such guileful, covinous and fraudulent means as aforesaid, shall or may be in any wise disturbed, hindered, delayed or defrauded, to be wholly and entirely, fully, clearly and absolutely, to all intents, constructions and purposes, void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, that all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bond, suits, judgments, executions and other things before expressed, which at any time after the tenth day of *June* next coming, wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, or made *bona fide* and upon good consideration; (3) or shall alien or assign any the lands, tenements, goods, leases or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof; (4) shall incur the penalty and forfeiture

ERRATA

Note that proposed section 71.1(1) of The Business Corporations Act set out on pages 9-10 should read as follows:

71.1(1) A transfer, pledge, or security interest in a security of the following types may be made or taken by an entry in the records of the clearing agency or by other methods recognized by law:

(a) a security that is shown in the records of a clearing agency and is evidenced by a security certificate in the custody of a clearing agency and is in bearer form or endorsed in blank by an appropriate person as defined in section 61 or registered in the name of the clearing agency, and

(b) an uncertificated security registered or recorded in records maintained by or on behalf of the clearing agency.

Note that the correct citation for Bank of Nova Scotia v. International Harverster Credit Corperation of Canada Ltd., referred to on page 2, is **(1990), 29 O.R. (2nd) 193.**

93-00207/

PROPOSALS FOR A NEW PERSONAL PROPERTY SECURITY ACT

Law Reform Commission of Saskatchewan

Saskatoon, Saskatchewan

Report to the Minister of Justice

June, 1992

The Law Reform Commission of Saskatchewan was established by **An Act to Establish a Law Reform Commission** proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Mr. Dale G. Linn, Q.C., Chairman.

Madam Justice Marjorie A. Gerwing

Mr. Gordon J. Kuski, Q.C.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., LL.B. is the Legal Research Officer. The Secretary is Mrs. Kelly Bateman.

* * * * * * * * * * * * * * * * * *

The Law Reform Commission Act.

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law....

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Saskatchewan

Law Reform
Commission of
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The Honourable Robert W. Mitchell, Q.C.
Minister of Justice
Province of Saskatchewan
REGINA, Saskatchewan

Dear Mr. Minister:

The Saskatchewan Personal Property Security Act was pioneering legislation when it was adopted in 1980. It has worked well, replacing ineffective registration systems under several enactments with a modern, unified system of registration, establishment of priorities, and enforcement of security interests in personal property.

The apparent success of the PPSA does not mean that it cannot be improved, however. In addition, "second generation" personal property security legislation has been adopted by other western provinces since 1980. This legislation was modelled largely on the Saskatchewan PPSA, but more immediately grew out of the efforts of the Western Canada Personal Property Security Committee (now the Canadian Conference on Personal Property Security Law). In 1989, the Committee approved a model Western Canada PPSA. The British Columbia and Alberta Acts adopted in 1989-90 were based on the model. Manitoba is also planning to replace its existing PPSA with legislation based on the model.

The Commission was involved with the WCPPSC since its inception, and played a significant role in preparation of the model act. The Commission believes that essential uniformity in personal property security legislation is a desirable goal. Our recommendations have been cast in the form of a new Act in order to achieve as much uniformity with other western Canadian legislation as possible.

However, neither Alberta nor British Columbia have adopted the model without modification, and the new Act proposed in this report also differs in some respects from the model. In each case, some adaption to the local environment has been neccessary. The Commission consulted extensively with Saskatchewan practitioners of commercial, secured transactions, and banking law, in preparation of its proposals to ensure that the new Act will be acceptable to the commercial community in the province.

Many of the differences between the proposed Act and the existing Personal Property Security Act are intended to do no more than provide clarification and correct lapses in the drafting of the original legislation. In other cases, changes have appeared to be desirable as the result of court decisions interpreting the original legislation. Some of the recommendations break new ground, however. For example, provision is made in the new Act for remote computer registration of financing statements. This is an innovation that will be welcomed by the Bar and financial institutions. Similarly, considerable attention has been given to circumventing potential conflicts between the personal property security system and the land titles system.

One aspect of the proposals is unavoidably controversial. At present, conflict exists between the provincial personal property security regime and the rights of chartered banks as secured creditors under the federal Bank Act. Final resolution of this problem will require a co-operative effort between the provinces and the federal government. The Commission's proposals in this regard are merely a stop-gap, and involve policy issues with ramifications for federal-provincial relations which require careful consideration.

Pursuant to Section 9 of the Law Reform Commission Act, the Commission now submits this report recommending enactment of a new Personal Property Security Act.

Respectfully submitted this 15th day of June, 1992.

Dale G. Linn, Q.C.,
Chairman.

Madame Justice Marjorie Gerwing,
Commissioner.

Gordon D. Kuski, Q.C.,
Commissioner.

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PROPOSALS FOR A NEW PERSONAL PROPERTY SECURITY ACT

I. BACKGROUND

In December of 1990 the Commission published *Tentative Proposals for a New Personal Property Security Act*. The Commission recommended the repeal of the existing *Personal Property Security Act*, R.S.S. 1978, c. P-6.1 and enactment of a new Act. While the conceptual structure of the existing Act remains as valid as when the Act came into force and the Act is working quite well, the Commission nevertheless concluded that there are good reasons for proposing a new Act at this time.

This conclusion was based on several factors. The first is the need to make corrections that would result in "fine tuning" legislation in this area of the law so as to eliminate some minor problems associated with it and to clarify a few matters that had resulted in litigation with inappropriate outcome. Another factor was the need for a personal property security system that can accommodate remote search and registration access to the Personal Property Registry. Finally, the Commission is convinced of the importance of harmonization of personal property security legislation in Western Canada.

The *Tentative Proposals* were widely circulated in the practising bar and institutions in the secured lending business. Meetings were held with bar committees at which suggestions for improvement were made. In addition, written briefs were received from individuals. This process resulted in several minor changes to the draft Act contained in the Report. These changes are noted in brief commentary accompanying the amended provisions set out below.

Developments since publication of the *Tentative Proposals* have induced the Commission to make a few significant changes in the Draft Act. These changes are explained in the following paragraphs.

II. FURTHER INTEGRATION OF SASKATCHEWAN PERSONAL PROPERTY SECURITY LAW

During the consultation process, the Commission was presented with a proposal by its principal consultant, Professor Ronald Cuming, to revise and integrate into Part 5 of the proposed new Act a number of legislative provisions dealing with personal property security law currently contained in *The Executions Act*, *The Distress Act* and *The Limitation of The Civil Rights Act*. After discussing these proposals with bar committees, the Commission decided to proceed as suggested by Professor Cuming. Accordingly, the draft Act set out in this report contains several new provisions not found in the draft Act contained in the *Tentative Proposals*. See sections 56(4)-(7); 58(3)-(13); 60(6)-(11). Full explanation of the objective and effect of the integrated provisions is set out below in the commentary to the relevant provisions.

III. OVERLAPPING FEDERAL AND PROVINCIAL PERSONAL PROPERTY SECURITY LAW

In the *Tentative Proposals* the Commission described the legal confusion that has developed as a result of overlap of provincial personal property security law and section 178 of the *Bank Act*. It was noted that banks have adopted techniques designed to place themselves in the position of being able to draw on either or both personal property security regimes. The two methods in common use are: (1) registration of a financing statement in the Personal Property Registry in the hope of being able to argue, should it be to the benefit of the bank, that its section 178 security interest thereby becomes as well a PPSA security interest; (2) taking duplicate section 178 and PPSA security interests in the same collateral to secure the same debt in the hope of being able to choose at the appropriate time whichever system of law is most advantageous to the bank.

Section 4(k) in the draft Act contained in the *Tentative Proposals* would deny efficacy to the first of these measures by making it clear that the Act does not apply to section 178 *Bank Act* security interests. However, the Commission did not include in the *Tentative Proposals* recommendations for dealing with the second measure. There were two reasons for not doing so. The first was the hope, notwithstanding the apparent approval of this approach in dicta in Birch Hills Credit Union v.Canadian Imperial Bank of Commerce [1988] 5 W.W.R. 592 (Sask. C.A.), that the courts would ultimately require banks using it to elect one source of law or the other. However, in the recent decision of the Ontario Court of Appeal in Bank of Nova Scotia v. International Harvester Credit Corporation of Canada Ltd. (1980), 29 O.R. (2d) 193 at least one of the justices appears give further encouragement to banks to use this approach. These admittedly preliminary indications point to an unwillingness on the part of the courts to force banks to elect between the two inconsistent sources of law.

The second reason the Commission did not include recommendations in the *Tentative Proposals* to deal with the use of dual security agreements was the hope that, in the near future, the Canada Department of Finance would be proposing amendments to the *Bank Act* that would address the confusion that has arisen in this area of the law. In fact, the Department published in the spring of 1991 a study *Position Paper on Revising Bank Act Security* which contains proposals for a revised Bank Act. However, it is the view of the Commission's consultant, Professor Cuming, that the amendments suggested in the study are such as to be generally unacceptable to provincial governments and banks. Thus, there appears to be little likelihood that problems in this area will be addressed in the near future by federal legislation.

The Commission has reluctantly come to the conclusion that further measures must be taken to attempt to reduce the difficulties associated with overlap of federal and provincial personal property security legislation. Accordingly, it has recommended in this report the addition of a new subsection to section 4 which is designed to prevent banks from having a provincial security interest and a federal security interest in the same collateral to secure the same obligation. The approach adopted is to declare void a security interest in collateral that secures an obligation also secured by the security interest in the same collateral taken under the *Bank Act*. A detailed explanation of the provision is set out commentary accompanying section 9(2) of the proposed legislation.

IV. SECURITY INTERESTS IN DEPOSITS USED TO PAY DEBTS

As a result of the statements made by the Saskatchewan Court of Appeal in Transamerica Commercial Finance Corp. v. Royal Bank of Canada (1990) 79 C.B.R. (N.S.) 127, there is considerable uncertainty as to applicable priority rule in the following situations:

> SP1, an inventory financer, takes and perfects a security interest in inventory and proceeds in the form of accounts, etc.
>
> Debtor sells inventory and receives cash which she deposits into a deposit account at a deposit-taking institution (credit union, bank or trust company).
>
> Debtor takes some of the funds from the account and pays Unsecured Creditor who takes the funds with notice of the fact that cash proceeds from the sale of inventory in which SP1 has a security interest were deposited into the account from which the payment was made.
>
> or
>
> SP1 takes and perfects a security interest Debtor's "all present and after-acquired personal property".
> During the currency of the agreement, Debtor takes some of the funds from a deposit account and pays Unsecured Creditor who takes the funds with notice of the fact that SP1 has a security interest in all of Debtors personal property.

If Debtor withdraws cash from the account and pays it to Unsecured Creditor, section 31(2) of the current Act and its counterpart in the Draft Act contained in the Tentative proposals gives to Unsecured Creditor priority over SP1. However, if Debtor draws a cheque on the account and delivers it to Unsecured Creditor, there is some doubt as to whether the provision protects Unsecured Creditor. No doubt, SP1 cannot claim priority with respect to the "instrument". However, it is not clear that it can claim priority to the funds paid to Unsecured Creditor under the authority of the instrument. section 31(2) of the Act gives to Unsecured Creditor priority over SP1 to instrument used to make the payment.

If Debtor uses a pre-authorized debit arrangement or an electronic funds transfer to pay Unsecured Creditor, Unsecured Creditor will likely not have priority over SP1. This form of payment is not expressly contemplated by section 31 of the existing or the proposed Act. This being the case, in order to give priority to Unsecured Creditor, a court would have to apply the "spirit" of section 31(2) rather than its specific wording. In the Court of Appeal in Transamerica Commercial Finance Corp. v. Royal Bank of Canada, refused to go beyond the strict wording of the subsection.

If the Unsecured Creditor, being the institution in which the deposit is held, simply seizes the account and pays itself, it does not have priority over SP1 unless it can establish a right of set-off.

It is the view of the Commission that the uncertainty that is associated with methods of payment other than by cash should be directly addressed so as to remove any doubt. The solution should be based on the following public policy choices.

Any payment, in whatever form, **initiated by a debtor** should give priority to unsecured creditor whether or not it is the holder of the deposit from which the payment is made. This policy choice might be opposed on the grounds that it gives to the debtor the power to defeat a security interest in funds either in the form of original collateral or cash proceeds merely by choosing to pay unsecured creditors (or other secured creditors). However, the basic policy choice has already been made. It is contained in section 31 of the existing Act. This policy choice is based on the conclusion that the standard debt payment mechanisms should not be adversely affected by security interests in proceeds. There are obvious limitations to the concept of a security interest in funds (including accounts in deposit-taking institutions) whether original collateral or cash proceeds. Secured parties should not be given the power to prevent debtors from paying other creditors out of liquid assets held by them. If this were allowed, great disruption in commercial activity would result.

However, the Act should not recognize as a payment initiated by a debtor debits against debtor's account made by a creditor which is also the deposit-taking institution holding the deposit account, unless it is clear that the debtor specifically authorized this method of payment. The debtor should not be seen as specifically authorizing payment merely because she has consented in advance, as part of the terms on which the account is held, to such deductions being made from her account.

The reason a creditor who is also the deposit-taking institution holding debtor's account must be treated differently is because such an institution wears two hats: that of a creditor and that of a deposit holder. These two functions must be kept separate (except to the extent that they permit the institution to exercise a common law right of set-off). Apart from the question of simple fairness, there is the real concern that security interests in cash proceeds will be rendered useless if the cash proceeds can be taken by the deposit-taking institution to satisfy any unsecured (or secured) debt owing by a debtor to it. Of course there can be no objection to a debtor taking steps to pay the deposit-taking institution out of the account. There is no reason to place such an institution in a worse position merely because it wears the two hats.

It follows from this that section 31 should give priority to any creditor who receives a debtor initiated payment using funds in which there is a security interest. Section 31(2) of the proposed Act implements this policy. A detailed examination of the provision is set out commentary accompanying it.

V. SECURITY INTERESTS IN DEPOSIT ACCOUNTS TAKEN BY DEPOSIT TAKING INSTITUTIONS

In Transamerica Commercial Finance Corp. v. Royal Bank of Canada (1990) 79 C.B.R. (N.S.) 127, the Saskatchewan Court of Appeal held that a deposit taking institution does not get the benefit of SPPSA s. 34(4) which gives priority to a security interest in accounts over a proceeds purchase money security interest in the accounts. The Commission has concluded that, as a policy matter, the Court is correct. The policy of section 34(4) is to protect credit grantors

who take business accounts as collateral. It was never intended as a method to give preference to a deposit taking institution that claims priority with respect to an account where it is the account debtor. This aspect of the decision in Transamerica has been codified in section 34(7).

VI. SECURITY INTERESTS IN PRODUCTION QUOTAS

As a result of the decision of the Ontario Court of Appeal in Re National Trust and Bouckhuyt (1988), 43 D.L.R.(4th) 643, considerable uncertainty surrounds the question of whether or not a licence or production quota issued under statutory orderly marketing schemes is property that can be subject to a security interest. In this case, the Court held that a production quota issued by the Ontario Flue-Cured Tobacco Growers' Marketing Board under the authority of the Ontario *Farm Products Marketing Act* is not intangible personal property, with the result that the holder of the quota does not have rights in it as collateral so as to be able to give a security interest in it. The Court relied heavily on the fact that the control exercised by the Tobacco Board was absolute and complete.[1]

There are two competing public policy issues underlying the issue in the National Trust case. One the one hand, production quotas are of significant commercial value and, in effect, must be bought by producers. Because their high value, it is very likely that a person wishing to acquire a quota must borrow the purchase price of it. On the other hand, an important aspect of any orderly marketing system is the control that the marketing board has over the production of the regulated commodity. There has been reluctance on the part of marketing authorities to recognize that the holder of a quota has any proprietary right in it. The fear is that recognition of such rights will weaken the ability of the authority to control production.

During the course of preparing this report, it was brought to the attention of the Commission that the current state of the law as represented by the National Trust decision is considered to be generally unsatisfactory. Upon closer study of the matter it was discovered that there is considerable support for recognition of production quotas as property that can be taken as collateral under security agreements so long as the relevant marketing board retains the power to fulfil its mandate. This being the case, the decision was made to facilitate the use of quotas as collateral, by including specific provisions in the proposed Act.

The approach that has been taken is to recognize a new category of collateral: "licences". See section 2(1)(w). The term is not defined. However, the Lieutenant Governor in Council is given power to define it by regulations. See section 73(b). It is contemplated that the regulations will define the term to include those quotas that by general agreement of producers, lenders and the relevant marketing boards should be available as collateral.[2] In order to permit the

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[1] In Canadian Imperial Bank of Commerce v. Hallahan (1990) 69 D.L.R.(4th) 449 the Ontario Court of Appeal raised doubts concerning its decision in the National Trust but refused to reconsider it.

[2] For example, such a regulation may provide as follows:

51. The following are licences for the purposes of section 2(1)(w) of The Personal Property Security Act

marketing board to retain its power over disposition of quota rights, the proposed Act provides that the quota may be disposed of only subject to the conditions and limitations prescribed in regulations pertaining to the licence or set by the board which issued the licence. See Section 59(18).

VII. SECURITY INTERESTS IN IMMOBILIZED OR UNCERTIFICATED SECURITIES: PERFECTION BY "POSSESSION"

The existing Act was drafted on the assumption that securities are certificated and that transfers of securities involve the transfer of those certificates. The result is that the definition of the term "security" refers to a written form and perfection of a security by possession involves taking possession of the form.

Practices in securities transactions are changing. Because of the cost and inconvenience of dealing with large volumes of securities certificates, methods are being implemented to avoid the necessity to deal physically with certificates. One of these methods is to "immobilize" certificates in the possession of an agency which will then keep records of the securities it holds. Generally, immobilization involves having the securities registered in the name of the agency. Dealing with the interests represented by the certificates occurs through entries in the records of the agency. In other words, the record of ownership of the securities or other interests in them is no longer the security certificate, it is an entry in the records of the agency. Interests in securities are not transferred by physical delivery of certificates, but by entries in the books of the agency.

The second and most advanced development in this area is the complete elimination of security certificates. These types of securities are referred to as "uncertificated securities". The only essential difference between this approach and the approach described in the preceding paragraph is that, rather than merely immobilizing issued certificates, no certificates are issued at all by the issuer. Securities are reduced to entries in the records an agency.

Under the existing Act, there is some doubt as to whether it is possible for a secured party to perfect a security interest in an immobilized security by possession. Where immobilized securities are involved, the security certificate is generally registered in the name of the clearing agency or is in bearer form. In all cases the security certificate is held by the clearing agency or by its nominee. This being the case, a secured party will not take possession of the certificate. An outstanding issue is whether the secured party can be seen as having taken possession of the security by treating the entry of the interest of the secured party in the

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(a) a total production quota under The Milk Control Regulations,

(b) a quota or permit under The Broiler Hatching Egg Marketing Plan Regulations,

(c) a quota under The Saskatchewan Commercial Egg Producers' Marketing Plan Regulations and

(d) a quota under The Saskatchewan Turkey Producers' Marketing Plan.

records of the clearing agency as a holding by the agency on behalf of the secured party. Section 24(1) of the exiting Act and the Act proposed in *Tentative Proposals* provides that "possession of the collateral by the secured party, **or on his behalf by another person,** perfects a security interest in a security". In the likely event that possession of the clearing agency is viewed as the possession of the secured party, there remains the problem that clearing agency might be seen as agent for the debtor and the secured party. Section 24(2) of the existing and proposed Act provides that for the purpose of perfection by possession, "a secured party is deemed not to have taken or retained possession of collateral which is in the apparent possession or control of the debtor **or the debtor's agent**."

One of the difficulties in dealing with the legal effect of transfer or creation of interests in immobilized or uncertificated securities in the context of the Personal Property Security Act is that these method of dealing with securities are not sanctioned by or recognized in Saskatchewan business corporations or securities legislation. In a sense, therefore, treating an entry in the books of an agency as a change in possession for the purpose of perfection under the PPSA is having the tail wag the dog. This being the case, the appropriate path to follow is to make amendments to business corporations law to address transactions in immobilized or uncertificated securities in conjunction with amendments to personal property security legislation to deal with perfection by possession of security interests in these types of securities. It is relevant to note that in the United States special provision was made in Article 8, 1972 (revised in 1977) to deal with the transfer of interests in immobilized securities. Indeed, perfection of security interests in such securities was transferred from Article 9 (the Article dealing with security interests) to Article 8. This lead was followed in Ontario. The Ontario *Business Corporations Act 1982*, as amended in 1986, provides specifically for the transfer and creation of security interests in immobilized and uncertificated securities.

It is most unlikely that for the foreseeable future the volume of trading in securities of any kind in Saskatchewan will reach the level that systems for dealing with immobilized or uncertificated securities will be established in this province. However, it does not follow that the problems associated with immobilized or uncertificated securities will not be encountered in Saskatchewan. It is not inconceivable that corporations which have their head offices in Saskatchewan will issue securities that are handled through a clearing agency in another jurisdiction. Nor is it inconceivable that persons resident in Saskatchewan who owns securities held by clearing agencies elsewhere will wish to give security interests in those securities to secured parties carrying on business in Saskatchewan or elsewhere. Without specific recognition in Saskatchewan law that security interests in immobilized or uncertificated securities can be perfected by deemed possession, considerable uncertainty may result. Some of the problems encountered in this context are demonstrated in the following scenario:

> Assume that ABC Company, which has its head office in Saskatoon, "issues" a block of shares to be registered in the name of Security Clearing House, a clearing agency, in Vancouver, British Columbia. Assume also that D is a member of the clearing agency and is recorded in its records as the "owner" of some of the ABC shares. D wishes to borrow money from SP in Saskatchewan and give to SP a security interest in its shares in ABC Company. SP will want to know whether or not the entry of its interest in the shares in the records of

Security Clearing House is sufficient "perfection" to avoid the necessity of having to take further steps.

Under the existing Act, there is considerable uncertainty as to the applicable law. If Saskatchewan law recognizes that the notation in the records of Security Clearing House is perfection by possession, the law applicable to perfection would be that of British Columbia since SP's security interest would be a "possessory security interest in securities" under section 5(1). However, if Saskatchewan law requires actual physical possession of security certificates by SP in order for there to be perfection by possession, the law applicable to the transaction would be that of Saskatchewan law since SP's security interest would be a "non-possessory security interest in securities". The absence of any special recognition in Saskatchewan law that "transfers" of securities can occur through book entries might induce a Saskatchewan Court to conclude that there has been no change in possession of the security with the result that SP's security interest is a non-possessory security interest. This would produce a result contradictory to that prevailing under British Columbia law (which recognizes that the SP's security interest is a possessory security interest governed by the law of that Province). This is hardly a satisfactory state of affairs.

Where uncertificated securities are involved, it is clear that under the existing Act recording of ownership or a security interest held by SP by the agency would not be treated as perfection by possession of the securities. Uncertificated securities are not "securities" under the Act, but are intangibles security interest in which can be perfected only by registration.

In *Tentative Proposals* provisions were included to address these concerns. Section 24 of the proposed Act provides for deemed possession of a security through entry in the records of a clearing corporation "as provided by the law applicable to the transfer of securities". Clearly this provision contemplates a backup system of business corporation law that recognizes a book based system for dealing with certificated and uncertificated securities. Other provisions of the Act designed to deal with transactions involving immobilized and uncertificated securities are found in sections 2(kk), 5(2) and 31(3)(d).

In the draft Act set out in this report, sections 2(nn) and 5(2) have been retained. The principle that entry of a transfer or creation of a security interest in the records of a clearing agency is deemed to be transfer of possession of the security to the transferee or secured party is contained in a new section 2(5). However it is the view of the Commission that the picture should be completed through changes in *The Business Corporations Act* that will have the effect of recognizing book-based transactions involving securities. The following recommended provisions are based in substantial part on section 85 of the Ontario *Business Corporations Act*.

44(2) ...
(c) "bona fides purchaser" means a purchaser for value, in good faith and without notice of any adverse claim,

(i) who takes delivery of a security in bearer form or of a security in registered form issued to him or endorsed to him or endorsed in blank,

(ii) in whose name an uncertificated security is registered or recorded in records maintained by or on behalf of the issuer as a result of the issue or transfer of the security to him, or

(iii) who is a transferee or pledgee as provided in 71.1.

(d.1) "clearing agency" means a person designated by the Securities Commission, and where the context permits, includes a custodian or nominee appointed by a clearing agency and subject to its instructions;

(j) "holder" means

(i) a person in possession of a security issued or endorsed to him or to bearer or in blank,

(ii) a person who deposits a security certificate with a clearing agency or in whose name a security is recorded in the records of a clearing agency, or

(iii) a transferee or pledgee of a security as provided in section 71.1.

(k) "issuer" includes a corporation

(i) that is required by this Act to maintain a security register, or

(ii) that directly or indirectly creates fractional interests in its rights or property and that issues securities as evidence of such fractional interests

(iii) that authorizes the issue of a security certificate or uncertificated security;

(n) "security" means and instrument issued by a corporation that is

(i) in bearer, registered or order form,

(ii) of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any areas in which it is issued or dealt with as a medium for investment,

(iii) one or a class or series or by it terms divisible into a class or series, and

(iv) evidence of a share, participation or other interest in or obligation of the issuer and includes a security certificate or uncertificated security where the context permits.

(q.1) "uncertificated security" means a security, not evidenced by a security certificate, the issue, transfer, pledge of which or security interest in which is recorded in records maintained for that purpose by or on behalf of the issuer.

71.1(1) The transfer or pledge of a security interest in a security, which is

(a) shown in the records of a clearing agency and is evidenced by a security certificate security in the custody of a clearing agency and is in bearer form or endorsed in blank by an appropriate person as defined in section 61 or registered in the name of the clearing agency,

(b) an uncertificated security registered or recorded in records maintained by or on behalf of the issuer in the name of the clearing agency may be made by an entry in the records of the clearing agency or by other methods recognized by law.

(2) An entry referred to in subsection (1) may be in respect of ike securities or interests therein as part of a fungible bulk and may show merely a quantity or the amount of the securities transferred or pledged or the balance of the securities after clearing.

(3) A entry referred to in subsection (1)

(a) has the effect of delivery of a security in bearer form or duly endorsed in blank representing the amount of the obligation or the number of shares or rights involved,

(b) is deemed to be a transfer of possession of the security to a transferee or pledgee, but

(c) is not a registration of transfer under sections 71-75.

VIII. SECURITY INTERESTS IN LEASEHOLD PAYMENTS

In *Tentative Proposals* the Commission recommended that security interests in leasehold payments be taken out of personal property security legislation and placed in *The Land Titles Act*. This approach has received general acceptance among solicitors who work in this area. However, some criticism was offered with respect to technical aspects of the proposed provisions of *The Land Titles Act*. Set out below are redrafted provision designed to meet these objections.

124.3(1) For the purposes of this section

(a) "assignee" includes a secured party,

(b)"assignment" includes a security agreement,

(c) "easement" includes easements under *The Public Utilities Easement Act*, the *National Energy Board Act* and *The Pipeline Act*,

(d) "lessee" includes the holder of an easement,

(e) "prior law" means the law in force immediately before the coming into force of this section,

(f) "rents" means amounts payable or to be paid under a lease, including a lease provided in section 134, and amounts payable for an easement.

(2) For the purposes of determining priority among successive holders of rights in rents, an interest arising under an assignment of rents is deemed to be an interest in land.

(3) A caveat relating to an interest arising under an assignment of rents may be filed.

(4) A caveat relating to an interest arising under an assignment of rents filed before this section comes into force is effective for the purposes of subsection (3).

(5) This section does not apply where

(a) all of the competing interests arose prior to the coming into force of this section, or

(b) the conflict is between an interest that arose prior to the coming into force of this section and an interest that arose on or after the coming into force of this section but before the expiry of six months thereafter.

(6) A lessee may pay rents to the grantor of the lease or the easement

(a) before the lessee receives a notice in writing that

(i) states that the rents payable or to become payable by the lessee are to be made to an identified assignee of the rents, and

(ii) describes the lease or easement with sufficient particularity identify the rents, or

(b) after

(i) the lessee requests the assignee to furnish proof of the assignment, and

(ii) the assignee fails to furnish proof within 15 days from the date of the request.

(7) Payment by a lessee to an assignee in accordance with a notice referred to in subsection (2) discharges the obligation of the lessee to the extent of the payment.

Section 145(2) of *The Land Titles Act* is amended by adding to the beginning of the section the following:

(2) Subject to section 124.3...

PROPOSED NEW PERSONAL PROPERTY SECURITY ACT AND COMMENTARY

SHORT TITLE

1 **This Act may be cited as *The Personal Property Security Act*.**

DEFINITIONS AND INTERPRETATION

2(1) **In this Act,**

(a) **"accessions" means goods that are installed in or affixed to other goods;**

(b) **"account" means any monetary obligation not evidenced by chattel paper, an instrument or a security , whether or not it has been earned by performance:**

(c) **"advance" means the payment of money, the provision of credit or the giving of value and includes any liability of the debtor to pay interest, credit costs and other charges or costs payable by the debtor in connection with an advance or the enforcement of a security interest securing the advance;**

(d) **"building" means a structure, erection, mine or work built, constructed or opened on or in land;**

(e) **"building materials" means materials that are incorporated into a building and includes goods attached to a building so that their removal**

(i) **would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or**

(ii) **would result in weakening the structure of the building or exposing the building to weather damage or deterioration,**

but does not include

(iii) **heating, air conditioning or conveyancing devices, or**

(iv) **machinery installed in a building or on land for use in carrying on an activity in the building or on the land;**

(f) "chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or a security interest in specific goods and accessions;

(g) "collateral" means personal property that is subject to a security interest;

(h) "commercial consignment" means a consignment under which goods are delivered to for sale, lease, or other disposition to a consignee, who, in the ordinary course of the consignee's business, deals in goods of that description, by a consignor who,

(i) in the ordinary course of the consignor's business deals in goods of that description, and

(ii) reserves an interest in the goods after they have been delivered,

but does not include an agreement under which goods are delivered

(iii) to an auctioneer for sale, or

(iv) to a consignee for sale, lease or other disposition if the consignee is generally known to the creditors of the consignee to be selling or leasing goods of others;

(i) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

(j) "court" means the Court of Queen's Bench;

(k) "creditor" includes an assignee for the benefit of creditors, an executor, an administrator or a property guardian of a creditor;

(l) "crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, and includes only trees that

(i) are being grown as nursery stock,

(ii) are being grown for uses other than for the production of lumber and wood products, or

(iii) are intended to be replanted in another location for the purpose of reforestation;

(m) "debtor" means

(i) a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral,

(ii) a person who receives goods from another person under a commercial consignment,

(iii) a lessee under a lease for a term of more than one year,

(iv) a transferor of an account or chattel paper,

(v) in sections 17, 24, 26, 58, 59(14), 61(7), and 65, the transferee of a debtor's interest in the collateral, or

(vi) if the person referred to in (i) and the person who has rights in the collateral are not the same person

(A) where the term is used in a provision dealing with the collateral, the person who has rights in the collateral,

(B) where the term is used in a provision dealing with the obligation, the obligor, and

(C) where the context permits, both persons mentioned in (A) and (B);

(n) "default" means

(a) the failure to pay or otherwise perform the obligation secured when due or

(b) the occurrence of any event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable;

(o) "document of title" means a writing issued by or addressed to a bailee

(i) that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and

(ii) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of that person, or to bearer or to the order of a named person;

(p) "equipment" means goods that are held by a debtor other than as inventory or consumer goods;

(q) "financing change statement" means

(i) a printed financing change statement as prescribed; and

(ii) where the context permits, data authorized authorized by the regulations to be transmitted to the Registry to amend or discharge a registration;

(r) "financing statement" means

(i) a printed financing statement in the form prescribed and required or permitted to be registered under this Act, and

(ii) where the context permits,

(A) data authorized under the regulations to be transmitted to an office of the Registry to effect a registration,

(B) a financing change statement, and

(C) a security agreement registered prior to the date *The Personal Property Security Act* S.S. 1980-81, c. P-6.1 came into force.

(s) "fixture" does not include building materials;

(t) "future advance" means an advance, whether or not made pursuant to an obligation and includes advances, reasonable costs incurred and expenditures made for the protection, maintenance, preservation or repair of the collateral;

(u) "goods" means tangible personal property, fixtures, crops and the unborn young of animals but does not include chattel paper, a document of title, an instrument, a security, money or trees, other than crops, until they are severed or minerals until they are extracted;

(v) "instrument" means

(i) a bill of exchange, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),

(ii) any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(iii) a letter of credit or an advice of credit if the letter of credit or advice of credit states on it that it must be surrendered on claiming payment,

but does not include

(iv) chattel paper, a document of title or a security, or

(v) a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing.

(w) "intangible"

(i) means personal property that is not goods, chattel paper, a document of title, an instrument, money or a security,

(ii) and includes a licence as prescribed.

(x) "inventory" means goods that are

(i) held by a person for sale or lease, or that have been leased by that person as lessor,

(ii) to be furnished or have been furnished under a contract of service, or

(iii) raw materials or work in progress, or

(iv) materials used or consumed in a business;

(y) "lease for a term of more than one year" includes

(i) a lease for an indefinite term and includes a lease for an indefinite term that is determinable by one or both of the parties within one year from the date of its execution,

(ii) a lease initially for a term of one year or less than one year where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period in excess of one year after the day the lessee, with the consent of the

lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year,

(iii) a lease for a term of one year or less where

(A) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms, and

(B) the total of the terms, including the original term, may exceed one year,

but does not include

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods,

(v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or

(vi) a lease of prescribed kinds of goods, regardless of the length of the lease term;

(z) "Minister" means the member of the Executive Committee to whom for the time being the administration of this *Act* is assigned;

(aa) "money" means a medium of exchange

(i) authorized by the Parliament of Canada, or

(ii) authorized or adopted by a foreign government as part of its currency;

(bb) "new value" means value other than antecedent debt or liability;

(cc) "obligation secured" means, when determining the amount payable under a lease that secures payment or performance of an obligation,

(i) the amount originally contracted to be paid under the lease,

(ii) any other amount payable pursuant to the terms of the lease, and

(iii) any other amount required to be paid by the lessee to obtain ownership of the collateral,

less any amount paid before the determination;

(dd) "pawnbroker" means a person who engages in the business of granting credit to individuals for personal, family or household purposes and who

(i) takes and perfects security interests in consumer goods by taking possession of them; or

(ii) purchases consumer goods under agreements or undertakings, express or implied, that the goods may be repurchased by the sellers;

(ee) "personal property" includes goods, chattel paper, documents of title, instruments, money, securities and intangibles;

(ff) "prescribed" means prescribed in the regulations;

(gg) "proceeds" means

(i) identifiable or traceable personal property, fixtures and crops

(A) derived directly or indirectly from any dealing with collateral or the proceeds of collateral, and

(B) in which the debtor acquires an interest,

(ii) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral, and

(iii) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or a security;

(hh) "purchase" means taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in personal property;

(ii) "purchase money security interest" means

(i) a security interest taken in collateral to the extent that it secures all or part of its purchase price,

(ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights,

(iii) the interest of a lessor of goods under a lease for a term of more than one year, and

(iv) the interest of a consignor who delivers goods to a consignee under a commercial consignment,

but does not include a transaction of sale and the lease back to the seller; and for the purposes of this clause, "purchase price" and "value" include credit charges or interest payable for the purchase or loan credit;

(jj) "receiver" includes receiver-manager;

(kk) "Registrar" means the Registrar of Personal Property Registry designated under section 42;

(ll) "Registry" means the Personal Property Registry designated under section 42;

(mm) "secured party" means

(i) a person who has a security interest,

(ii) a person who holds a security interest for the benefit of another person, and

(iii) a trustee, if a security interest is embodied in a trust indenture;

(nn) "security" means a document that is

(i) issued in bearer or registered form,

(ii) of a type commonly dealt with upon securities exchanges or markets or commonly recognized in an area in which it is issued or dealt in as a medium of investment;

(iii) one of a class or series or, by its terms, divisible into classes or series of documents, and

(iv) evidence of a share, participation or other interest in property or in an enterprise or is evidence of an obligation of the issuer,

and includes an uncertificated security under *The Business Corporations Act* or other law relating to securities, but does not include a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing;

(oo) "security agreement" means an agreement that creates or provides for a security interest, and if the context permits, includes a writing that evidences a security agreement;

(pp) "security interest" means

(i) an interest personal property that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and

(ii) the interest of

(A) a transferee arising from the transfer of an account or a transfer of chattel paper,

(B) a consignor who delivers goods to a consignee under a commercial consignment, and

(C) a lessor under a lease for a term of more than one year,

whether or not the interest secures payment or performance of an obligation;

(qq) "specific goods" means goods identified and agreed upon at the time a security agreement in respect of those goods is made;

(rr) "trust indenture" means a deed, indenture, or document, however designated, by the terms of which a person issues or guarantees or provides for the issue or guarantee of debt obligations secured by a security interest and in which another person is appointed as trustee for the holders of the debt obligations issued, guaranteed or provided for under it;

(ss) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability, and "new value" means value other than antecedent debt or liability.

2(2) For the purposes of this Act,

(a) a natural person knows or has knowledge when information is acquired by the person under circumstances in which a reasonable person would take cognizance of it,

(b) a partnership knows or has knowledge when information has come to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it,

(c) a corporation knows or has knowledge

(i) when information has come to the attention of

(A) a managing director or officer of the corporation, or

(B) a senior employee of the corporation with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it, or

(ii) when information in writing has been delivered to the corporation's registered office or attorney for service,

(d) the members of an association know or have knowledge when information has come to the attention of

(i) a managing director or officer of the association,

(ii) a senior employee of the association with responsibility for matters to which the information relates, or

(iii) all members,

under circumstances in which a reasonable person would take cognizance of it,

(e) a government knows or has knowledge when information has come to the attention of a senior employee of the government with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it.

2(3) **Unless provided otherwise in this Act, the determination whether goods are "consumer goods", "inventory" or "equipment" shall be made as of the time the security interest in the goods attaches.**

2(4) **Proceeds are traceable whether or not there is a fiduciary relationship between the person who has a security interest in the proceeds, as provided in section 28, and the person who has rights in or has dealt with the proceeds.**

2(5) **Where the collateral is a security, the transfer of which may be effected by an entry in the records of a clearing agency as provided in *The Business Corporations Act* or other law relating to the transfer of an interest in a security, the transferee or secured party, as the case may be, is deemed to have taken possession of the security when the appropriate entries have been made in the records of the clearing agency.**

PART I

APPLICATION OF THE ACT

3(1) **Subject to section 4, this Act applies**

(a) **to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and**

(b) **without limiting the generality of clause (a), to a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, or assignment, consignment, lease, trust or transfer of chattel paper where they secure payment or performance of an obligation.**

(2) **Subject to section 4 and section 55, this Act applies to a transfer of an account or chattel paper, a lease for a term of more than one year and a commercial consignment, notwithstanding that the transfer, lease, or consignment does not secure payment or performance of an obligation.**

NON-APPLICATION OF THE ACT

4 **Except as otherwise provided in this Act, this Act does not apply to**

(a) **a lien, charge or other interest given by statute or rule of law, unless the statute contains an express provision that this *Act* applies.**

(b) **the creation or transfer of an interest or claim in or under a contract of annuity or policy of insurance except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral,**

(c) **the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services other than fees for professional services,**

(d) **a transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract,**

(e) **the creation or transfer of an interest in land including a lease,**

(f) the creation or transfer of a right to payment that arises in connection with an interest in or a lease of land other than a right to payment evidenced by a security or instrument,

(g) a sale of accounts or chattel paper as part of a sale of a business out of which they arose unless the vendor remains in apparent control of the business after the sale,

(h) a transfer of accounts made solely to facilitate the collection of accounts for the transferor,

(i) the creation or transfer of a right to damages in tort,

(j) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency,

(k) a security agreement governed by a statute of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including any agreement governed by Part V, Division B of the *Bank Act*.

CONFLICT OF LAWS: GOODS AND DOCUMENTARY COLLATERAL IN POSSESSION OF SECURED PARTY

5(1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of

(a) a security interest in goods, or

(b) a possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

is governed by the law of the jurisdiction where the collateral is situated when the security interest attaches.

(2) For the purposes of subsection (1), an uncertified security is situated where the records of the clearing agency are kept.

(3) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province,

(a) not later than 60 days after the goods are brought into the Province,

(b) not later that 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or

(c) before perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached,

whichever is earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

(4) A security interest that is not perfected as provided in subsection (3) may be otherwise perfected in the Province under this Act.

(5) Where a security interest referred to in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act.

CONFLICT OF LAWS: GOODS TO BE REMOVED FROM THE JURISDICTION

6(1) Subject to section 7,

(a) if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and

(b) if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches

the validity, perfection and effect of perfection or non-perfection of the security interest is determined by the law of the other jurisdiction.

(2) If the other jurisdiction referred to in subsection (1) is not this Province, and the goods are later brought into this Province, the security interest in the goods is deemed to be a security interest to which subsection 5(3) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

CONFLICT OF LAWS: SECURITY INTERESTS IN MOBILE GOODS, INTANGIBLES AND EXTRACTED MINERALS AND NON-POSSESSORY SECURITY INTERESTS IN DOCUMENTARY COLLATERAL

7(1) For the purposes of this section, a debtor is located at

(a) the place of business, if any, of the debtor,

(b) the chief executive office of the debtor, if the debtor has more than one place of business, and

(c) the principal residence of the debtor, if the debtor has no place of business.

(2) The validity, perfection and effect of perfection or non-perfection of

(a) a security interest in

(i) an intangible, or

(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others, and

(b) a non-possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

is governed by the law, including the conflict of law rules, of the jurisdiction where the debtor is located when the security interest attaches.

(3) Where a debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a perfected security interest perfected in accordance with the law applicable as provided in subsection (2) continues perfected in the province if it is perfected in the other jurisdiction

(a) not later than 60 days from the day the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction,

(b) not later than 15 days from the day the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the other jurisdiction, or

(c) prior to the day that perfection ceases under the law of the first jurisdiction,

whichever is earliest.

(4) If the law governing the perfection of a security interest referred to in subsection (2) or (3) does not provide for public registration or recording of such security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to

(a) an interest in an account payable in the Province,

(b) an interest in goods, a security, an instrument, a negotiable document of title, money or chattel paper acquired when the collateral was situated in the Province,

unless it is perfected under this Act before the interest referred to in paragraph (a) or (b) arises.

(5) A security interest referred to in subsection (4) may be otherwise perfected under this Act.

(6) Notwithstanding section 6 and subsection (2) of this section, the validity, perfection and effect of perfection or non-perfection of a security interest in minerals or in an account resulting from the sale of the minerals at the minehead

(a) that is provided for in a security agreement executed before the minerals are extracted, and

(b) that attaches to the minerals upon extraction or attaches to an account upon sale of the minerals,

is governed by the law of the jurisdiction in which the minehead is located.

(7) For the purposes of subsection (6), "minerals" includes petroleum and gas and "minehead" includes "wellhead".

CONFLICT OF LAWS: PROCEDURAL AND SUBSTANTIVE ISSUES

8(1) Notwithstanding sections 5, 6, and 7,

(a) procedural issues involved in the enforcement of the rights of a secured party against collateral other than intangibles are

governed by the law of the jurisdiction in which the collateral is located when the rights are exercised,

(b) subject to paragraph (c), procedural issues involved in the enforcement of the rights of a secured party against intangibles are governed by the law of the forum, and

(c) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

(2) For the proposes of sections 5, 6, and 7, a security interest is perfected under the law of a jurisdiction if the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest with the result that the security interest has a status in relation to other secured parties, buyers and judgment creditors and a trustee in bankruptcy of the debtor similar to that of an equivalent security interest created and perfected under this Act.

PART II

EFFECTIVENESS OF SECURITY AGREEMENT

9(1) Except as otherwise provided in this or any other Act, a security agreement is effective according to its terms.

(2) A security interest in collateral is void to the extent that it secures payment or performance of an obligation that is also secured by an interest in the same collateral arising under an agreement, whenever executed, to which the *Bank Act (Canada)* applies.

COMMENT

Section 9(2) is a companion provision to section 4(k). While section 4(k) is designed to preclude the argument that a Bank Act security is a security interest under this Act, this provision is designed to nullify security interests arising under security agreements in situations where a bank takes both a provincial security interest and a Bank Act security in the same collateral to secure the same obligation. The approach taken in section 9(2) is quite different from that taken in section 4(k). In order to preclude banks from claiming that their Bank Act interests are security interest under the Act, it is sufficient to exclude federal security agreements from the scope of the Act. However, in order to force banks to choose between rights under federal or provincial personal property security law, it is necessary to nullify any attempt to invoke provincal law through a security agreement paralleling an agreement providing for a Bank Act security.

Section 9(2) does not preclude a bank from having the same obligation secured by a federal and a provincial security agreement so long as the obligation is secured by a security interest in different collateral. For example, it would not threaten the efficacy of a security interest in separately owned property given to a bank by A and B to secure a joint obligation also secured by a security under section 427 of the Bank Act. It would not affect a security interest given by A in collateral X to secure an obligation which is also secured in whole or in part by a Bank Act security interest in collateral Y. Nor would it affect a security interest in proceeds of collateral under a Bank Act security if those proceeds are not themselves collateral under the Bank Act.

ENFORCEABILITY

10(1) Subject to subsection (2), a security agreement is only enforceable against a third party where

(a) the collateral is in the possession of the secured party, or

(b) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind, or by reference to one or more of the following: goods, chattel paper, security, document of title, instrument, money, intangible, or crops,

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired property except specified items or kinds of personal property or except one or more of the following: goods, chattel paper, security, document of title, instrument, money, intangible, or crops.

(2) For the purposes of clause (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.

(3) A description is inadequate for the purposes of clause (1)(b) if it describes the collateral as consumer goods or equipment without further reference to the item or kind of collateral.

(4) A description of collateral as inventory is adequate for the purposes of clause (1)(b) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is enforceable against a third party whether or not the security agreement contains a description of the proceeds.

DELIVERY OF COPY OF SECURITY AGREEMENT

11 Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor not later than 10 days after the execution of the security agreement and, if the secured party fails to do so after a request by the debtor, a Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.

TIME OF ATTACHMENT OF SECURITY INTEREST

12(1) A security interest attaches when

(a) value is given,

(b) the debtor has rights in the collateral, and

(c) except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

unless the parties have specifically agreed to postpone the time of attachment, in which case it attaches at the time specified in the agreement.

(2) For the purposes of subsection (1)(b) and without limiting other rights, if any, which the debtor may have, a lessee under a lease for a term of more than one year or a consignee under a commercial consignment has rights in the goods when the lessee or consignee obtains possession of them pursuant to the lease or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in

(a) crops until they become growing crops,

(b) the young of animals until they are conceived,

(c) oil, gas or minerals until they are extracted, or

(d) trees, other than crops, until they are severed.

AFTER-ACQUIRED PROPERTY

13(1) Subject to section 12 and subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12 without specific appropriation by the debtor.

(2) A security interest does not attach to after-acquired property that is crops that become growing crops more than one year after the security agreement has been entered into, except that a security interest in crops that is given in conjunction with a lease, agreement for sale or mortgage of land may, if the parties so agree, attach to crops to be grown on the land concerned during the term of the lease, agreement for sale purchase or mortgage.

FUTURE ADVANCES

14(1) A security agreement or a related agreement may provide for future advances.

(2) Unless the parties otherwise agree, an obligation owing to a debtor to make future advances is not binding on a secured party if the collateral has been seized, attached, charged or made subject to an equitable execution under

circumstances described in subclauses 20(1)(a) or (b), and the secured party has knowledge of this fact before making the advances.

APPLICATION OF SALES LAW

15 Where a seller retains a purchase money security interest in goods, the law relating to contracts of sale, including a disclaimer, limitation or modification of the seller's performance obligations with respect to the goods, governs the sale.

ACCELERATION OF PAYMENT OR PERFORMANCE

16 Where a security agreement provides that a secured party may accelerate payment or performance by the debtor when the secured party considers that the collateral is in jeopardy or that the secured party is or believes himself insecure, the provision shall be construed to mean that the secured party has the right to do so only if the secured party believes and has commercially reasonable grounds to believe that the collateral is or is about to be placed in jeopardy or that the prospect of payment or performance is or is about to be impaired.

CARE OF COLLATERAL IN POSSESSION OF SECURED PARTY

17(1) In this section, "secured party" includes a receiver.

(2) A secured party shall use reasonable care in the custody and preservation of collateral in the possession of the secured party, and, unless the parties otherwise agree, in the case of an instrument, a security or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

(3) Unless the parties otherwise agree, where collateral is in the secured party's possession,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral, are chargeable to the debtor and are secured by the collateral,

(b) the risk of loss or damage, except where caused by the negligence of the secured party is on the debtor to the extent of any deficiency in any insurance coverage,

(c) the secured party may hold as additional security any increase or profits, except money, resulting from the collateral, and shall

apply any money so received, unless remitted to the debtor, immediately upon its receipt in reduction of the obligation secured, and

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled.

(4) Subject to subsection (2), a secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement,

(b) for the purpose of preserving the collateral or its value, or

(c) pursuant to an order of the court.

REQUEST BY DEBTOR OR INTERESTED PARTY FOR INFORMATION

18(1) The debtor, a creditor, a sheriff, a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party

(a) at the secured party's most recent address set forth in a registered financing statement containing a description of personal property of the debtor, or

(b) at the current address of the secured party, if known by the person making the demand,

require the secured party to send or make available the information specified in subsection (2) to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor.

(2) The information that may be demanded under subsection (1) may be any one or more of the following

(a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor,

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand,

(c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand,

(d) a written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand,

(e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it.

(3) A person with an interest in personal property of the debtor is entitled to make a demand under subsection (1) only with respect to a security agreement providing for a security interest in the property in which the person has an interest.

(4) The secured party, on demand of the person entitled to receive a copy of the security agreement under subsection (1), shall permit the person to inspect the security agreement of a copy of it during normal business hours at the location referred to in clause (2)(e).

(5) Where a demand is made in accordance to subsection (2)(c) and the secured party claims a security interest in all of the personal property of the debtor, in all the property of the debtor other than a specified kind or item of property or in all of a specified kind of property of the debtor, the secured party may indicate this in lieu of approving or correcting the itemized list of the property.

(6) The secured party, other than a trustee under a trust indenture, shall reply to the demand made under subsections (1) or (4) not later than 10 days after the demand is made.

(7) A secured party who is a trustee under a trust indenture shall reply to the demand made under subsections (1) or (4) not later than 25 days after the demand is made.

(8) Where, without reasonable excuse,

(a) the secured party fails to comply with the demand within the time specified, or

(b) in the case of a demand under subsection (1), the reply is incomplete or incorrect,

the person making the demand, in addition to any other remedy provided by this Act, may apply to the court for an order requiring the secured party to comply with the demand.

(9) Where a person receiving a demand under subsection (1) or (4) no longer has an interest in the obligation or property of the debtor that is the subject of the demand, that person shall, not later than 10 days after receiving the demand, disclose the name and address of the immediate successor in interest and, if known to the person, the latest successor in interest.

(10) Where, without reasonable excuse, the person receiving the demand fails to comply with subsection (9), the person making the demand, in addition to any other remedy provided in this Act, may apply to a court for an order requiring that person to comply with subsection (9).

(11) On application under subsection (8) or (10), the court may make an order requiring

(a) the secured party referred to in subsection (8) to comply with the demand referred to in that subsection, or

(b) the person referred to in subsection (9) to disclose the information referred to in that subsection.

(12) In an application under subsection (8),(10) or in a separate application, the court may make

(a) any order it considers necessary to ensure compliance with the demand, and

(b) in the case of an application under subsection (8), an order that, in the event of non-compliance with the order of the court to respond to the demand, the security interest of the secured party with respect to which the demand was made is unperfected or extinguished and that any related registration be discharged.

(13) On an application under subsection (8) or (10), or on an application of the secured party referred to in subsection (8) or the person referred to in subsection (9), the court, subject to section 65(5), may

(a) unless the demand is made by the debtor, exempt the secured party or person receiving the demand in whole or in part from complying with subsection (1) or (9), or

(b) extend the time for compliance.

(14) A secured party who has replied to a demand referred to in subsection (1) is estopped, for the purposes of this Act, as against

(a) the person making the demand; or

(b) any other person who can reasonably be expected to rely on the reply,

to the extent that the person relied on the reply, from denying

(c) the accuracy of the information contained in the reply to the demand under subsections (2)(b), (c) or (d),

(d) that the copy of the security agreement provided in response to a demand under subsection (2)(a) is a true copy of the security agreement required to be provided by subsection (1)(a).

(15) A successor in interest referred to in subsection (9) is estopped, for the purposes of this Act, as against

(a) the person making the demand referred to in subsection (1) and

(b) any other person who can reasonably be expected to rely on the reply to the demand,

to the extent that the person has relied on the reply, from denying

(c) the accuracy of the information contained in the reply to the demand under subsections 2(b), (c) and (d), and

(d) that the copy of the security agreement that was provided in response to a demand under subsection (1)(a) is a true copy of the security agreement required to be provided by subsection (1)(a).

(16) A successor in interest referred to in subsection (9) is not estopped under subsection (15) where

(a) the person making the demand knows the identity and address of the successor in interest, or

(b) prior to the demand, a financing change statement has been registered as provided in section 45 disclosing the successor in interest as the secured party.

(17) The person to whom a demand is made under this section may require payment in advance of a fee in the amount prescribed for each demand, but the debtor is entitled to a reply without charge once every six months.

(18) A secured party who receives a demand that purports to be made by a person entitled to make it under subsection (1) may act as if the person is, in fact, entitled to make the demand unless the secured party know that the person is not entitled to make it.

PART III

PERFECTION AND PRIORITIES

TIME OF PERFECTION

19 A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

SUBORDINATION OF UNPERFECTED SECURITY INTERESTS

20(1) A security interest in collateral is subordinate to the interest of

(a) a person who causes the collateral to be seized under legal process to enforce a judgment, including execution, attachment or garnishment, or who has obtained a charging order or equitable execution affecting or relating to the collateral,

(b) a sheriff who has seized or has obtained a right to the collateral under *The Creditors' Relief Act*,

(c) a judgment creditor entitled by law to participate in the distribution of property or its proceeds seized under legal process as provided in *The Creditors' Relief Act*, and

(d) a representative of creditors, but only for the purposes of enforcing the rights of persons referred to in clause (a),

if that security interest is unperfected at the time the interest of the persons mentioned in (a), (b), or (d) arises, or the judgment creditor referred to in (c) delivers a writ of execution or certificate to the sheriff under *The Creditors' Relief Act*.

(2) A security interest in collateral is not effective against

(a) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy or

(b) a liquidator appointed under the *Winding-up Act* (Canada) if the security interest is unperfected at the date that the winding-up order is made,

(3) A security interest in goods, chattel paper, a security, a document of title, an instrument or an intangible or money is subordinate to the interest of a transferee who

(a) acquires the interest under a transaction that is not a security agreement,

(b) gives value, and

(c) acquires the interest without knowledge of the security interest before the security interest is perfected.

(4) For the purposes of subsection (3), a purchaser of an instrument or a security or a holder of a negotiable document of title who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction vilolates the terms of the security agreement creating or providing for the security interest.

DAMAGES RECOVERABLE BY LESSOR OR CONSIGNOR

21 Where the interest of a lessor under a lease for a term of more than one year or of a consignor under a commercial consignment is not effective against an execution creditor under section 20(a) or a trustee or liquidator under section 20(b), the lessor or consignor is deemed, as against the lessee or consignee, as the case may be, to have suffered, immediately before the seizure of the leased or consigned goods or the date of the bankruptcy or winding-up order, damages in an amount equal to

(a) the value of the leased or consigned goods at the date of the seizure, bankruptcy, or winding-up order, and

(b) the amount of loss, other than that referred to in clause (a), resulting from the termination of the lease or consignment.

PURCHASE-MONEY SECURITY INTERESTS

22(1) A purchase money security interest in

(a) collateral, other than an intangible, that is perfected not later than 15 days after the day the debtor, or another perons, at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible that is perfected not later than 15 days from the day the security interest attaches,

has priority over the interest of a person mentioned in clause 20(a) or (b).

(2) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor does not obtain possession of the goods until the debtor or a third party at the request of the debtor obtains actual possession of the goods or a document of title to the goods, whichever is earlier.

CONTINUITY OF PERFECTION

23(1) If a security interest is originally perfected under this Act and is again perfected in some other way under this Act without an intermediate period when it is unperfected, the security interest is continuously perfected for the purposes of this Act.

(2) A transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.

PERFECTION BY POSSESSION

24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in

(a) chattel paper,

(b) goods,

(c) an instrument,

(d) a security,

(e) a negotiable document of title, and

(f) money,

except where possession is a result of seizure or repossession.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

PERFECTION BY REGISTRATION

25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

TEMPORARY PERFECTION WITH RESPECT TO COLLATERAL RETURNED TO THE DEBTOR

26(1) A security interest perfected under section 24 in

(a) an instrument or a security that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registration of a transfer, or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected, notwithstanding section 10, for the first 15 days after the collateral comes under the control of the debtor.

(2) After the expiration of the period of time mentioned in subsection (1), a security interest referred to in this section is subject to the provisions of the Act relating to the perfection of a security interest.

PERFECTION WHEN GOODS HELD BY BAILEE

27(1) Subject to section 19, a security interest in goods in the possession of a bailee is perfected by

(a) issue of a document of title by the bailee in the name of the secured party,

(b) perfection of a security interest in a negotiable document of title to the goods where the bailee has issued one,

(c) a holding on behalf of the secured party pursuant to section 24, or

(d) registration of a financing statement relating to the goods.

(2) The issue of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A perfected security interest in a negotiable document of title covering goods takes priority over a security interest in goods otherwise perfected after the goods become covered by a negotiable document of title.

SECURITY INTEREST IN PROCEEDS

28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral unless the secured party expressly or impliedly authorizes such dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected by registration of a financing statement that

(a) contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) covers the original collateral, if the proceeds consist of money, cheques or deposit accounts in banks or similar institutions.

(3) Where the security interest in the original collateral is perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes

unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.

PERFECTION AND PRIORITY WHEN GOODS ARE RETURNED, SEIZED OR REPOSSESSED

29(1) Where a debtor sells or leases goods that are subject to a security interest under circumstances in which the buyer or lessee takes free of the security interest under section 28(1)(a) or 30, the security interest reattaches to the goods if

(a) the goods are returned to, seized or repossessed by the debtor or by a transferee of chattel paper created by the sale or lease, and

(b) the obligation secured remains unpaid or unperformed.

(2) Where a security interest reattaches under subsection (1), the perfection of the security interest and the time of registration or perfection is determined as if the goods had not been sold or leased if the security interest was perfected by registration at the time of the sale or lease and the registration is effective at the time of the return, seizure or repossession.

(3) Where a sale or lease of goods creates an account or chattel paper, and

(a) the account or chattel paper is transferred to a secured party, and

(b) the goods are returned to, seized or repossessed by the debtor or by the transferee of the chattel paper,

the transferee of the account or chattel paper has a security interest in the goods that attaches when the goods are returned, seized or repossessed.

(4) A security interest in goods arising under subsection (3) is perfected if the security interest in the account or chattel paper was perfected at the time of the return, seizure or repossession, but becomes unperfected on the expiry of 15 days thereafter unless the transferee registers a financing statement relating to the security interest or takes possession of the goods by seizure, repossession or otherwise, before the expiration of that period.

(5) A security interest in goods that a transferee of an account has under subsection (3) is subordinate to a perfected security interest arising under subsection (1) and to a security interest of a transferee of chattel paper arising under subsection (3).

(6) A security interest in goods that a transferee of chattel paper has under subsection (3) has priority over

(a) a security interest in goods reattaching under subsection (1), and

(b) a security interest in goods as after-acquired property that attaches on the return, seizure or repossession of the goods,

if the transferee of the chattel paper would have priority under section 31(7) as to the chattel paper over an interest in the chattel paper claimed by the holder of the security interest in the goods.

(7) A security interest in goods given by a buyer or lessee of the goods referred to in subsection (1) that attaches while the goods are in the possession of the buyer, lessee or debtor and that is perfected when the goods are returned, seized or repossessed has priority over a security interest in the goods arising under this section.

PRIORITY OF BUYERS OR LESSEES OF GOODS

30(1) For the purposes of this section,

(a) "buyer of goods" includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods becoming a fixture or accession to property in which the person has an interest,

(b) "ordinary course of business of the seller" includes the supply of goods in the ordinary course of business as part of a contract for services and materials,

(c) "seller" includes a person who supplies goods that become a fixture or accession under a contract with a buyer or under a contract with a person who is party to a contract with such a buyer.

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of goods that are acquired as consumer goods or goods bought for farming uses takes free of a perfected of unperfected security interest in the goods if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in

(a) a fixture, or

(b) goods the purchase price of which exceeds $1,000.00 or, in the case of a lease, the market value of which exceeds $1,000.00.

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under subsection 26(1), 28(3), or 29(4), or a security interest the perfection of which is continued under section 51 during any of the 15-day periods referred to in those subsections, if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under section 25 if

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and

(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed as serial numbered goods.

(8) A sale or lease under subsections (2), (3), (5) or (6) may be

(a) for cash,

(b) by exchange for other property, or

(c) on credit,

and includes delivering goods or a document of title under a pre-existing contract for sale but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

PRIORITY OF HOLDERS OR PURCHASERS OF MONEY, INSTRUMENTS, SECURITIES, DOCUMENTS OR TITLE OR CHATTEL PAPER

31(1) A holder of money has priority over a security interest in it perfected under section 25 or temporarily perfected under subsection 28(4) if the holder

(a) acquired the money without knowledge that it is subject to a security interest, or

(b) is a holder for value, whether or not that person acquired the money without knowledge that it is subject to a security interest.

(2) A creditor who receives payment of a debt owing by a debtor through a debtor initiated payment has priority over a security interest in

(a) the funds paid,

(b) the intangible which was the source of the payment, and

(c) any instrument used to effect the payment,

whether or not the creditor has knowledge of the security interest at the time of the payment.

(3) In subsection (2), "debtor initiated payment" means:

(a) subject to (c), payment effected through use of an instrument, debit or transfer order, authorization or similar written payment mechanism executed by the debtor,

(b) subject to (c), payment effected through an electronic funds transfer initiated by the debtor,

(c) in the case of payment to a deposit-taking institution from a deposit account of the debtor held by the institution,

(i) payment mentioned in clauses (a) and (b) initiated or made by the debtor at the time the debt is payable or thereafter,

(ii) payment effected through the use of a post-dated cheque drawn by the debtor,

(iii) payment pursuant to a written authorization executed by the debtor as part of a loan or other credit transaction, under which the debtor became indebted to the deposit-taking institution, which

(A) sets out specified amounts, or specified amounts and a formula for determining applicable interest or credit charges, to be debited to the deposit account at specified times or intervals

(B) provides that interest or credit charges are to be debited to the deposit account and a formula for determining the amount of such interest or charges, or

(C) authorizes debits to the deposit account when the credit in the deposit account exceeds an amount specified in the written authorization

but does not include payment authorized by the deposit-taking institution as agent of the debtor.

(4) A purchaser of an instrument or a security has priority over a security interest in the instrument or security perfected under section 25 or temporarily perfected under subsection 28(3) if the purchaser

(a) gave value for the instrument or security,

(b) acquired the instrument or security without knowledge that it is subject to a security interest, and

(c) took possession of the instrument or security.

(5) A holder to whom a negotiable document of title is negotiated has priority over a security interest in the document of title that is perfected under section 26 or subsection 28(4) if the holder

(a) gave value for the document of title, and

(b) acquired the document of title without knowledge that it is subject to a security interest.

(6) For the purposes of subsections (4) and (5), a purchaser of an instrument or a security or a holder of a negotiable document of title who acquired it under a transaction entered into in the ordinary course of the

transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction violates the terms of the security agreement creating or providing for the security interest.

(7) A purchaser of chattel paper who takes possession of it in the purchaser's ordinary course business and for new value has priority over any security interest in the chattel paper that

(a) was perfected under section 25, if the purchaser does not have knowledge at the time of taking possession that the chattel paper is subject to a security interest, or

(b) has attached to proceeds of inventory under section 28, whatever the extent of the purchaser's knowledge.

PRIORITY OF REPAIRERS' LIENS

32 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has in respect of such materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have such priority.

ALIENATION OF DEBTOR'S RIGHTS IN COLLATERAL

33(1) For the purposes of this section, "transfer" includes a sale, the creation of a security interest or a transfer under judgment enforcement proceedings.

(2) The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

PRIORITY OF PURCHASE-MONEY SECURITY INTERESTS

34(1) In this section, a "non-proceeds security interest" or "non-proceeds purchase money security interest" means a security interest or purchase money security interest, as the case may be, in original collateral.

(2) Subject to subsection (6) and section 28, a purchase money security interest in

(a) collateral or its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible or its proceeds that is perfected not later than 15 days after the day the security interest in the intangible attaches,

has priority over any other security interest in the same collateral given by the same debtor.

(3) Subject to subsection (6) and section 28, a purchase money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if

(a) the purchase money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

(b) the secured party gives a notice to any other secured party who has, before the time of registration of the purchase money security interest, registered a financing statement containing a description that includes the same item or kind of collateral,

(c) the notice referred to in clause (b) states that the person giving the notice expects to acquire a purchase money security interest in inventory of the debtor, and describes the inventory by item or kind, and

(d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(4) A notice referred to in subsection (3) may be given in accordance with section 68 or by registered mail addressed to the address of the person to be notified as it appears in the financing statement referred to in subsection (3)(b).

(5) Subject to section 28, a purchase money security interest in goods and its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected

(a) in the case of inventory, at the date a debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, no later than 15 days after a debtor, or another person at the request of a debtor, obtains possession of the collateral, whichever is earlier,

has priority over any other purchase money security interest in the same collateral given by the same debtor.

(6) A non-proceeds security interest in accounts given for new value has priority over a purchase money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase money security interest is perfected or a financing statement relating to it is registered.

(7) Subsection (6) does not apply to a security interest in an account held by a secured party who is the account debtor as defined in section 41(1)(a).

(8) A non-proceeds purchase money security interest has priority over a purchase money security interest in the same collateral or proceeds, if the non-proceeds purchase money security interest is perfected

(a) in the case of inventory, at the date a debtor, or another person at the request of a debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, not later than 15 days after a debtor, or another person at the request of a debtor, obtains possession of the collateral, whichever is earlier.

(9) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by a debtor, the debtor is deemed not to have obtained possession of the goods until the debtor has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

(10) A purchase money security interest in an item of collateral does not extend to or continue in the proceeds of the item after the obligation to pay the purchase price of the item or repay the value given for the purposes of enabling the debtor to aquire rights in it has been discharged.

(11) A perfected security interest in crops or their proceeds given for value to enable a debtor to produce the crops and given while the crops are growing crops or during a period of six months immediately prior to the time the crops become growing crops, has priority over any other security interest in the same collateral given by the same debtor.

(12) A perfected security interest in fowl, cattle or fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the fowl, cattle or fish has priority over any other

security interest in the same collateral given by the same debtor other than a perfected purchase money security interest.

RESIDUAL PRIORITY RULE

35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between conflicting perfected security interests in the same collateral is determined by the order of the occurrence of the following

(i) the registration of a financing statement without regard to the date of attachment of security interest,

(ii) possession of the collateral pursuant to section 24 without regard to the date of attachment of the security interest, or

(iii) perfection under sections 5, 7, 26, 29, or 72
whichever is earliest,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between conflicting unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1), a continuously perfected security interest is to be treated at all times as perfected by the method by which it was originally perfected.

(3) For the purpose of subsection (1), but subject to section 28, the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.

(4) A security interest in goods that are equipment and are of a kind prescribed as serial numbered goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (8) or section 34(2) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

(5) **Subject to subsection (6), the priority which a security interest has under subsection (1) applies to all advances, including future advances.**

(6) **A perfected security interest has priority over the interests of persons referred to in clause 20(a) only to the extent of**

(a) **advances made before the interests of the persons arise, or made before the sheriff seizes the collateral or obtains a right to it under *The Creditors' Relief Act*,**

(b) **advances made before the secured party acquires knowledge of**

(i) **the interests of the persons,**

(ii) **seizure of the collateral by the sheriff, or**

(iii) **an order giving the sheriff rights to the collateral,**

(c) **advances made pursuant to a**

(i) **statutory requirement, or**

(ii) **a legally binding obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in paragraph (b), and**

(d) **reasonable costs and expenses incurred by the secured party for the protection, preservation, maintenance or repair of the collateral.**

(7) **Where registration of a security interest lapses as a result of a failure to renew the registration or where a registration is discharged without authorization or in error, and the secured party registers the security interest not later than 30 days after the lapse or discharge, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest that immediately prior to the lapse or discharge had a subordinate priority position, except to the extent that such competing security interest secures advances made or contracted for after the lapse or discharge and prior to the reregistration.**

(8) **Where a debtor transfers an interest in collateral which at the time of the transfer is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer except to the extent that the security interest granted by the transferee secures advances made or contracted for**

(a) after the expiry of 15 days from the day the secured party who holds the security interest in the transferred collateral has knowledge of the information required to register a financing change statement showing the transferee as the new debtor, and

(b) before the secured party referred to in clause (a) amends the registration to disclose the name of the transferee as the new debtor or takes possession of the collateral.

(9) Subsection (8) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

COMMENT

Under sections 35(4) and (5) of the Draft Act set out in the Tentative Proposals, failure to include a serial number on a registered financing statement did not affect the priority status of the holder of a purchase money security interest vis-a-vis the holder of a subsquent non-purchase money security interest in the equipment.

The Commission has concluded that, since serial number registration of security interests in equipment is an established practice under the existing Act, it is not necessary to provide for this special exemption for purchase money security interests. Section 35(4) has been amended to make it clear that serial number registration is a requirement for all security interests in serial numbered goods held as equipment.

SECURITY INTERESTS IN FIXTURES

36(1) In this section, "secured party" includes a receiver.

(2) Except as otherwise prescribed, this section applies only with respect to land for which a certificate of title has been issued under *The Land Titles Act*.

(3) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land.

(4) A security interest referred to in subsection (3) is subordinate to the interest of

(a) a person who acquired for value an interest in the land after the goods become fixtures including an assignee for value of a person with an interest in the land at the time the goods become fixtures, and

(b) any person with a registered mortgage of the land who, after the goods become fixtures

(i) made an advance under the mortgage after the goods become fixtures, but only with respect to such advance, or

(ii) obtains an order for sale or foreclosure after the goods become fixtures,

without fraud and before the security interest is registered in accordance with section 49.

(5) Where

(a) a search is made of a certificate of title or condominium plan in a land titles office,

(b) at the time of the search there is no memorandum under section 49 on the certificate or plan, and

(c) on the day the search is made an advanced is made under a mortgage registered against the title or condominium plan,

the advance shall be deemed to have been made before registration of a notice under section 49 not disclosed by the search notwithstanding that the notice was registered on the day that the search was made.

(6) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who

(a) has an interest in the land at the time the goods become fixtures and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the goods or fixtures,

(iii) has not entered into an agreement under which person is entitled to remove the goods, or

(iv) is not otherwise precluded from preventing the debtor from removing the goods, or

(b) acquires an interest in the land after the goods become fixtures, if the interest is acquired without fraud and before the security interest in the goods is registered in accordance with section 49.

(7) A security interest referred to in subsection (4) or (6) is subordinate to

(a) the interest of a creditor of the debtor who causes a writ of execution affecting the real property to be transmitted to the appropriate land titles office,

(b) a sheriff who submits for registration in the appropriate land titles office a certificate affecting the land issued under *The Creditors' Relief Act*,

before the security interest is registered in accordance with section 49.

(8) The interest of a creditor or a sheriff referred to in subsection (7) does not take priority over a purchase money security interest in goods in respect of which a notice is filed in accordance with section 49 not later than 15 days after the goods are affixed to the land.

(9) A secured party who, under this Act, has the right to remove goods from land shall exercise this right of removal in a manner that causes no greater damage or injury to the land and to other property situated on it or that puts the occupier of the land to greater inconvenience than is necessarily incidental to the removal of the goods.

(10) A person, other than the debtor, who has an interest in the land at the time the goods subject to the security interest are affixed to the land is entitled to reimbursement for any damages to the interest of the person in the land caused during the removal of the goods, but is not entitled to reimbursement for diminution in the value of the land caused by the absence of the goods removed or by the necessity or replacement.

(11) The person entitled to reimbursement as provided in subsection (10) may refuse permission to remove the goods until the secured party has given adequate security for reimbursement.

(12) The secured party may apply to a court for any one or more of the following

(a) an order determining the person entitled to reimbursement under this section,

(b) an order determining the amount and kind of security to be provided by the secured party,

(c) an order prescribing the depository for the security,

(d) an order authorizing the removal of the goods without the provision of security for reimbursement under subsection (11).

(13) A person having an interest in the land that is subordinate to a security interest as provided in this section may, before the goods have been removed from the land by the secured party, retain the goods upon payment to the secured party of the lesser of

(a) the amount secured by the security interest having priority over such interest, and

(b) the market value of the goods if the goods were removed from the land.

(14) The secured party who has a right to remove goods from land shall give to each person who appears by the records of the land titles office to have an interest in the land, a notice of the intention of the secured party to remove the goods, and the notice shall contain

(a) the name and address of the secured party,

(b) a description of the goods to be removed,

(c) the amount required to satisfy the obligation secured by the security interest,

(d) the market value of the goods,

(e) a description of the land to which the goods are affixed, and

(f) a statement of intention to remove the goods

unless the amount referred to in subsection (13) is paid on or before a specified date than is not less than 15 days after the notice is given in accordance with subsection (12).

(15) A notice referred to in subsection (14) shall be given at least 15 days before removal of the goods, and may be given in accordance with section 68 or by registered mail addressed to the post office address of the person to be notified as it appears in the records of the land titles office.

(16) A person entitled to receive a notice under subsection (15) may apply to a court for an order postponing removal of the goods from the land.

(17) Priority rights of persons referred to in subsection (4) are not affected by priority rights to the land provided in *The Land Titles Act*.

COMMENT

There are two subsections in section 36 that did not appear in the Tentative Proposals. Subsection (5) has been included to address a logistical problem faced by mortgage financers. Subsection (4) gives priority to the holder of a security interest in the fixture if a notice if registered under section 49 before money is advanced under a mortgage on the land. This being the case, mortgage lenders must check the appropriate land registration office before making advances. However, they run the risk that immediately after checking the title to the land and before the advance is actually made, notice under section 49 will be registered by a fixture financer. The purpose of subsection (5) is to permit the mortgage financer to release funds under a mortgage any time during the day that the check of the title was undertaken.

Subsection (17) is designed to deal with a concern arising out of the recent decision of the Ontario Divisional Court, General Division, in G.M.S. Securities and Appraisals Limited v. Rich-Wood Kitchens Limited and The National Trust Company, (1991), 77 D.L.R.(4th) 18. In this case, the Court failed to recognize that the fixtures provisions in personal property security legislation were never designed to disrupt the basic priority rules of land law. The sequence of relevant facts of the case, very simply stated, was as follows:

1. National Trust took and registered a mortgage on the land. It then made advances under the mortgage.

2. Rich-Wood sold cabinets to the owner of the land under a secured instalment sales contract. The cabinets were affixed to the land. However, Rich-Wood failed to register the appropriate notice the land registry office as permitted (but not required) by the Ontario equivalent of section 36(2) of the present Saskatchewan Personal Property Security Act.

3. G.M.S. took a second mortgage on the land.

4. The owner of the land defaulted on the obligations to National Trust, Rich-Wood and G.M.S.

All but one of the advances under the National Trust mortgage were made before the cabinets were affixed to the land. One advance was made a month later.

The Court felt that it was compelled to resolve what it and the lower Court thought was a circular priority problem. Rich-Wood had priority over National Trust for all except the last advance. However, because Rich-Wood failed to register a notice under the Ontario equivalent of section 36(3) of the Act, G.M.S. had priority over Rich-Wood to the extent of the G.M.S. mortgage. Since the G.M.S. mortgage was second to that of National Trust, National Trust had priority over G.M.S. under Ontario real property law.

The Court made the a priori assumption that it would be "patently unjust and would in actuality make a mockery out of the system of security registration adopted in Ontario" (p. 23) to recognize that National Trust would have priority over Rich-Wood. The Court chose a very peculiar way to justify its conclusion that Rich-Wood would have priority. It concluded that once the Ontario equivalent of section 36(1) of the Saskatchewan Act is applied (in this case, so as to give priority to Rich-Wood to the amount of its claim over National with respect to all except the last advance), "the application of s. 36 is in effect exhausted.... Section 36(3) gives no indication that, on the facts before me, one is required to make a second reference to the section with respect to G.M.S." (p. 23).

There is, of course, no warrant in the wording of section 36 of the former Ontario Personal Property Security Act or section 36 of the Saskatchewan Act for this conclusion. Section 36(3) of the Ontario Act contained a specific priority rule designed to deal with the priority dispute between Rich-Wood and G.M.S. The fact that there is also a priority rule dealing with the priority dispute between Rich-Wood and National is quite beside the point.

There is an obvious "solution" to this type of circular priority problem should this issue arise in Saskatchewan. This solution does not involve a refusal to apply portions of section 36 of the Act. Under section 36(2), Rich-Wood had priority over National Trust for all but the final advance under the National mortgage. Because it failed to register its fixture interest in the land title office, it does not have priority over G.M.S. The security interest that Rich-Wood had and could protect against National was lost to G.M.S. So far as section 36 of the Act is concerned, the matter ends there. The result under section 36 is that G.M.S. has the same priority to the cabinets over Rich-Wood that it has with respect to the land.

The fact that National is in the picture has nothing to do with the operation of the section 36 as between G.M.S. and Rich-Wood. Further, section 36 says nothing about the relationship between National and G.M.S. However, the real property

law does; it gives priority to National because it had a first mortgage. This aspect of land law should have no effect on the operation of section 36 of the Act. Two very separate systems are involved. The operation of one of the systems should not be affected by the operation of the other.

This approach recognizes the legitimate expectations of the parties involved and the risks that they assumed. By failing to file a notice as required by section 49, Rich-Wood consciously undertook the risk that it would lose its security in the cabinets to G.M.S. It took the risk and lost. So far as it is concerned, it no longer has a security interest in the cabinets. G.M.S. took a second mortgage on the land and in so doing could reasonable expect to be subordinated to the National with respect to the land (including the fixtures). The fact that National ends up with the cabinets as part of the land is quite consistent with land law and not inconsistent with section 36 of the Act.

The new subsection (17) is designed to signal to the courts that the priority rules of The Land Titles Act are not to be taken into consideration when interpreting and applying the priority rules of section 36.

SECURITY INTERESTS IN GROWING CROPS

37(1) **In this section "secured party" includes a receiver.**

(2) **Subject to the regulations, this section applies only with respect to land for which a certificate of title has been issued under *The Land Titles Act*.**

(3) **Except as provided in this section, a security interest in growing crops has priority with respect to the crops claimed by a person with an interest in the land.**

(4) **A security interest referred to in subsection (3) is subordinate to the interest of**

(a) **a person who acquires for value an interest in the land while the crops are growing crops, including an assignee for value of a person with an interest in the land where the assignee acquires the interest for value and while the crops are growing crops, and**

(b) **any person with a registered mortgage on the land who**

(i) **makes an advance under the mortgage after the crops become growing crops, but only with respect to the advance, or**

(ii) **obtains an order for sale or foreclosure after the crops become growing crops,**

without fraud and before the security interest is registered in accordance with section 49.

(5) **A security interest referred to in subsection (3) is subordinate to**

(a) the interest of a creditor of the debtor who causes a writ of execution affecting the land to be transmitted to the appropriate land titles office,

(b) a sheriff who submits for registration in the appropriate land titles office a certificate affecting the land issued under *The Creditors' Relief Act*,

before the security interest is registered in accordance with section 49.

(6) The interest of a creditor or a sheriff referred to in subsection (5) does not take priority over a purchase money security interest in the crops, or a security interest in the crops referred to in subsection 34(10), that is registered in accordance with section 49 not later than 15 days after the time the security interest in the crops attaches.

(7) Subsections (9) to (17) of section 36 apply with all necessary modifications to seizure and removal of growing crops from the land.

SECURITY INTERESTS IN ACCESSIONS

38(1) In this section,

(a) "other goods" means goods to which an accession is installed or affixed,

(b) "the whole" means an accession and the goods to which the accession is installed or affixed,

(c) "secured party" includes a receiver.

(2) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over a claim to the goods as accession made by a person with an interest in the whole.

(3) A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the whole after the goods become an accession including an assignee for value of a person with an interest in the whole at the time the goods become an accession, and

(b) any person with a security interest taken and perfected in the whole who

(i) makes an advance under a security agreement after the goods become an accession, but only with respect to such advance, or

(ii) acquires the right to retain the whole in satisfaction of the obligation secured,

without knowledge of the security interest in the accession and before it is perfected.

(4) A security interest in goods that attaches after the goods becomes an accession is subordinate to the interest of a person who:

(a) has an interest in the other goods at the time the goods become an accession and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the goods or accessions,

(iii) has not entered into an agreement under which a person is entitled to remove the accession , or

(iv) is not otherwise precluded from preventing the debtor from removing the accession, or

(b) acquires an interest in the whole after the goods become an accession, if such interest is acquired without knowledge and before the security interest in the accession is perfected.

(5) A security interest referred to in subsections (2) and (4) is subordinate to the interest of a creditor or a sheriff who has seized or caused the whole to be seized under legal process to enforce a judgment, if the seizure occurs under circumstances referred to in section 20 and if the security interest is not perfected at the time of seizure.

(6) The interest of a creditor or a sheriff referred to in subsection (5) does not take priority over a purchase money security interest in goods that is perfected not later than 15 days after the goods become an accession.

(7) A secured party who, under this Act, has the right to remove accession goods from the whole shall exercise this right of removal in a manner that causes no greater damage or injury to the whole or the other goods or that puts the person in possession of the whole to greater inconvenience that is necessarily incidental to the removal of the accession goods.

(8) **A person, other than the debtor, who has an interest in the whole at the time the goods subject to the security interest become an accession is entitled to reimbursement for any damages to the interest of such person in the whole caused during the removal of the accession goods, but is not entitled to reimbursement for diminution in the value of the whole caused by the absence of the accession goods removed or by the necessity of replacement.**

(9) **The person entitled to reimbursement as provided in subsection (8) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement.**

(10) **The secured party may apply to a court for one or more of the following**

(a) **an order determining the person entitled to reimbursement under this section,**

(b) **an order determining the amount and kind of security to be provided by the secured party,**

(c) **an order prescribing the depository for the security,**

(d) **an order authorizing the removal of the goods without the provision of security for reimbursement under subsection (9).**

(11) **A person who has an interest in the whole that is subordinate to a security interest as provided in this section may, before the accession goods have been removed from the whole by the secured party, retain the accession on payment to the secured party of the lesser of**

(a) **the amount secured by the security interest entitled to priority, and**

(b) **the market value of the accession if the accession were removed from the other goods.**

(12) **The secured party who has a right to remove the accession from the whole shall give to each person**

(a) **who is known by the secured party to have an interest in the other goods or in the whole, or**

(b) **who has registered a financing statement**

(i) **using the name of the debtor and referring to the other goods, or**

(ii) according to the serial number of the other goods if they are goods defined in the regulations as serial numbered goods

a notice of the intention of the secured party to remove the accession, and the notice shall contain

(c) the name and address of the secured party,

(d) a description of the goods to be removed,

(e) the amount required to satisfy the obligations secured by the security interest,

(f) the market value of the accession,

(g) a description of the other goods, and

(h) a statement of intention to remove the accession unless the amount referred to in subsection (11) is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (13).

(13) A notice referred to in subsection (12) shall be given in accordance with section 68 or by registered mail addressed to the address of the person to be notified as it appears on the financing statement.

(14) A person entitled to receive a notice under subsection (12) may apply to a Court for an order postponing removal of the accession.

SECURITY INTERESTS IN PROCESSED OR COMMINGLED GOODS

39(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

(2) Subject to subsection (4) and (6), where more than one perfected security interest continues in the same product or mass under subsection (1), and each was a security interest in separate goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum of the obligations secured by all security interests.

(3) For the purpose of section 35, perfection of a security interest in goods that subsequently become part of a product or mass shall also be treated as perfection of the interest in the product or mass.

(4) For the purpose of subsection (2), the obligation secured by a security interest does not exceed the market value of the goods at the date that the goods become part of the product or mass.

(5) Any priority that a perfected security interest that continues in the product or mass under section (1) has over a perfected security interest in the product or mass is limited to the market value of the goods at the date that they became part of the product or mass.

(6) A perfected purchase money security interest in goods that continues in the product or mass has priority over a non-purchase money security interest

(a) in the goods that continues in the product or mass under subsection (1)

(b) in the product or mass, other than as inventory, given by the same debtor, and

(c) in the product or mass as inventory given by the same debtor if

(i) the secured party with the purchase money security interest gives a notice to the secured party with the non-purchase money security interest in the product or mass who registered a financing statement containing a description of collateral that includes the product or mass before the identity of the goods is lost in the product or mass,

(ii) the notice contains a statement that the person giving the notice has acquired or expects to acquire a purchase money security interest in goods supplied to the debtor as inventory, and

(iii) the notice is given before the identity of the goods is lost in the product or mass.

(7) A notice referred to in subsection (6)(c) may be given in accordance with section 68 or by registered mail addressed to the person to be notified as it appears in the financing statement referred to in subsection (6)(c).

(8) This section does not apply to a security interest in accession goods to which section 38 applies.

VOLUNTARY SUBORDINATION

40(1) A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest, and such subordination is effective according to its terms between the parties

and may be enforced by a third party if such third party is the person or one of a class of person for whose benefit the subordination was intended.

(2) An agreement or undertaking to subordinate or postpone

(a) the right of a person to performance of some or all of an obligation to the right of another person to the performance of some or all of another obligation of the same debtor, or

(b) some or all of the rights of a secured party under a security agreement to some or all of the rights of another secured party under another security agreement with the same debtor

does not, by virtue of the subordination or postponement alone, create a security interest.

RIGHTS ARISING ON ASSIGNMENT

41(1) In this section

(i) "account debtor" means a person who is obligated under an intangible or chattel paper,

(ii) "assignee includes a secured party and receiver.

(2) Unless the account debtor on an intangible or chattel paper has made an enforceable agreement not to assert defences to claims arising out of a contract, the rights of an assignee of the intangible or chattel paper are subject to

(a) the terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract or a closely connected contract, and

(b) any other defence or claim of the account debtor against the assignor that accrues before the account debtor acquires knowledge of the assignment.

(3) A modification of or substitution for a contract made in good faith and in accordance with reasonable commercial standard and without material adverse effect of the assignee's rights under the contract or the assignor's ability to perform the contract is effective against the assignee unless the account debtor has otherwise agreed.

(4) Subsection (3) applies

(a) to the extent that an assigned right to payment arising out of the contract has not been earned by performance,

(b) notwithstanding that there has been notice of the assignment to the account debtor.

(5) Where the contract has been substituted or modified in the manner referred to in subsection (3), the assignee obtains corresponding rights under the modified or substituted contract.

(6) Nothing in subsection (3) to (5) affects the validity of a term in an assignment agreement that provides that a modification or substitution referred to in that subsection is a breach of contract by the assignor.

(7) Where collateral which is either an intangible or chattel paper is assigned, the account debtor may make payments under the contract to the assignor

(a) before the account debtor receives a notice that

(i) states that the amount payable or to become payable under the contract has been assigned and payment is to made to the assignee, and

(ii) identifies the contract under which the amount payable is to become payable, or

(b) after

(i) the account debtor requests the assignee to furnish proof of the assignment, and

(ii) the assignee fails to furnish proof within 15 days from the date of the request.

(8) Payment by an account debtor to an assignee pursuant to a notice referred to in clause 7(a) discharges the obligation of the account debtor to the extent of the payment.

(9) A term in a contract between a debtor on an account or on chattel paper and an assignor that prohibits or restricts assignment of the whole of the account or chattel paper for money due or to become due is binding on the asignor, but only to the extent of making the assignor liable in damages for breach of contract, but is unenforceable against third parties.

PART IV

REGISTRATION

42(1) The Personal Property Registry established under section 41 of *The Personal Property Security Act*, 1979-80, c. P-6.1 is hereby continued for the purposes of registrations under this Act, under prior registration law and under any other Act, that are permitted or required to be made in the Registry.

(2) The office of Registrar of Personal Property as established under section 42 of *The Personal Property Security Act*, 1979-80, c. P-6.1 is hereby continued and the Registrar and Deputy Registrars shall continue until they are replaced by the Minister of Justice.

(3) The Registrar and Deputy Registrars shall continue to supervise the registry under the direction of the Minister of Justice and shall have such powers and obligations as set out in this Act and any other Act providing for registration in the Personal Property Registry and as prescibed in regulations to this Act or any other Act providing for registration in the Personal Property Registry.

(4) Notwithstanding any regulation made under this Act or any other Act providing for registration in the Personal Property Registry, when, in the opinion of the Registrar, the circumstances are such that it is not practical to provide one or more registry services, the Registrar may

(a) refuse to register financing statements,

(b) refuse to accept requests for search results, and

(c) otherwise suspend one or more of the functions of the Registry,

for the period of time during which, in the opinion of the Registrar, those circumstances prevail.

REGISTRATION OF FINANCING STATEMENTS

43(1) A financing statement may be submitted as prescribed for registration at an office of the registry.

(2) Registration of a financing statement is effective from the time assigned to it at the Registry and where two or more financing statements are assigned at the same date, the order of registration is determined by reference to the registration numbers assigned to them at the Registry.

(3) A financing statement may be registered before or after a security agreement is made and before or after a security interest attaches.

(4) A registration may relate to one or more than one security agreement.

(5) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.

(6) Subject to subsection (8), where one or more debtors are required to be disclosed in a financing statement or where collateral is consumer goods of a kind that are prescribed as serial numbered goods, and there is a seriously misleading defect, irregularity, omission or error in

(a) the disclosure of the name of any of the debtors, other than a debtor who does not own or have rights in the collateral or,

(b) the serial number of the collateral,

the registration is invalid.

(7) Nothing in subsection (5) or (6) requires as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was actually misled by it.

(8) Failure to provide a description in a financing statement in relation to any item or kind of collateral does not affect the validity of the registration with respect to other collateral.

(9) Notwithstanding anything in this Part, the Registrar may reject a financing statement when, in the opinion of the Registrar, it does not comply with this Act or the regulations or any other Act of regulation under which registration of a financing statement is authorized.

(10) The Registrar shall give the reason for the rejection of a financing statement under subsection (9).

(11) Unless a person entitled to a copy has waived in writing the right under this section to receive it, the secured party or person named as secured party in a financing statement shall give to each person named as debtor in the statement,

(a) a copy of the statement reproduced on paper, or

(b) a copy of a verification statement relating to the financing statement and issued by the Registry

not later than 30 days after it is registered or issued, as the case may be.

DURATION OF AND AMENDMENTS TO REGISTRATION

44(1) Except as otherwise prescribed, a registration under this Act is effective for the period of time indicated on the financing statement by which the registration was effected.

(2) A registration may be renewed by registering a financing change statement at any time before the registration expires, and, except as prescribed, the period of time for which the registration is effective shall be extended by the renewal period indicated on the financing change statement.

(3) An amendment to a registration may be effected by registering a financing change statement at any time during the period that the registration is effective, and the amendment is effective from the time when the financing change statement is registered to the expiry of the registration being amended.

(4) When an amendment of a registration is not otherwise provided for in this part, a financing change statement may be registered to amend the registration.

REGISTRATION OF TRANSFERS AND SUBORDINATION

45(1) Where a secured party with a registered security interest transfers the security interest or a part of it, a financing change statement may be registered disclosing the transfer.

(2) Where a financing change statement is registered under subsection (1) and an interest in part, but not all, of the collateral is transferred, the financing change statement shall contain a description of the collateral in which the interest is transferred.

(3) Where a secured party transfers an interest in collateral and the security interest of the secured party is not perfected by registration, a financing statement may be registered in which the transferee is disclosed as the secured party.

(4) A financing statement disclosing a transfer of a security interest may be registered before or after the transfer.

(5) After registration of a financing change statement disclosing a transfer of a security interest, the transferee is the secured party for the purposes of this Part.

(6) Where a security interest has been subordinated by the secured party to the interest of another person, a financing change statement may be

registered to disclose the subordination at any time during the period that the registration of the subordinated interest is effective.

REMOVAL OF INFORMATION FROM REGISTRY

46(1) Where a financing statement is registered in the Registry, the Registrar may have the statement photographed or otherwise reproduced and the reproduction is for all purposes deemed to be the statement photographed or reproduced.

(2) Information in a registration may be removed from the records of the registry

(a) when the registration is no longer effective,

(b) on the receipt of a financing change statement discharging or partially discharging the registration,

(c) if the secured party fails to submit to the Registrar a court order maintaining the registration under section 50, or

(d) on receipt of an order of a court compelling the discharge of partial discharge of a registration.

CONSTRUCTIVE NOTICE

47 Registration of a financing statement in the Registry is not constructive notice or knowledge of its existence or contents to any person.

REGISTRY SEARCHES

48(1) A person may request in the manner prescribed one or more of the following

(a) a search according to the name of a debtor and the issue of a search result,

(b) a search according to the serial number of goods of a kind that are prescribed as serial numbered goods and the issue of a search result,

(c) a search according to a registration number and the issue of a search result,

(d) a printed result of a search referred to in clauses (a) to (c),

(e) a copy or certified copy of any printed registered document.

(2) A printed search result that purports to be issued by the Registry is receivable as evidence as *prima facie* proof of its contents including

(a) the date of registration of a financing statement to which the search result refers, and

(b) the order of registration of the financing statement as indicated by the registration number.

(3) A copy of a printed registered financing statement or other registered document bearing the certification of the Registrar is receivable in evidence as a true copy of the statement or document without proof of the signature or official position of the Registrar.

REGISTRATIONS IN THE LAND TITLES OFFICE

49(1) In this section,

(a) "debtor" includes any person named in a notice under this section as a debtor,

(b) "secured party" includes any person named in a notice under this section as a secured party.

(2) A security interest in a fixture under section 36, and a security interest in a growing crop under section 37 may be registered by tendering a notice as prescribed to the land titles office for the appropriate land registration district.

(3) The Registrar of the land titles office to which the notice in subsection (1) is tendered shall make a memorandum of the notice on the certificate of title or the condominium plan, as the case may be, in respect of the parcel of land to which the notice relates.

(4) If a notice has been registered in a land titles office under subsection (2) and the registration of the notice has not expired, a notice of a renewal or amendment of the registration or a notice of transfer, discharge or subordination of the security interest may be registered in the land titles office as prescribed, and on its being registered, the Registrar of the land titles office shall make a memorandum of it on the proper certificate of title or condominium plan, as the case may be.

(5) Subsections 43(3), (4), (5), (7) and (8) and sections 44 and 45 apply, with all necessary modifications, to a notice registered under this section, and

subsection 43(11) applies with any necessary modification to a notice referred to in subsection (2) of this section.

(6) If a notice registered under this section expires, or has been discharged, the Registrar of the land titles office in which it has been registered may remove registration of the notice and any other notice that relates to the same security interest.

(7) Where a notice is registered under this section and

(a) all of the obligations under the security agreement to which the notice relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the notice,

(c) the description of the collateral contained in the notice includes an item of property that is not collateral under a security agreement between the secured party and the debtor, or

(d) no security agreement exists between the secured party and the debtor,

the debtor named in the notice and any person having a registered interest in the land may give a written demand to the secured party.

(8) The demand referred to in subsection (7) may require that

(a) in a case within subsection (7)(a) or (d), the registration of the notice be discharged,

(b) in a case within subsection (7)(b), the registration be amended or discharged, as the case may be, to reflect the terms of the agreement,

(c) in a case within subsection (7)(c), the collateral description on the notice be amended to exclude items of property that are not collateral under a security agreement between the secured party and the debtor,

and the secured party shall amend or discharge the registration of the notice accordingly not later than 15 days after the demand is given.

(9) Where the secured party fails to amend or discharge the registration of notice in accordance with the demand given pursuant to subsection (7) the person giving the demand may submit for registration the demand referred to in subsection (7) and the Registrar of the land titles office

shall amend or discharge the registration in accordance with the demand on receiving satisfactory proof that the demand has been given to the secured party.

(10) The demand referred to in subsection (7) may be given in accordance with section 68 or by registered mail addressed to the secured party as it appears on the notice registered under this section.

(11) Subsections (7) to (9) of section 50 apply with all the necessary modifications to a notice registered under this section.

(12) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand made under subsections (7) and (8), unless the charge has been agreed to by the parties before the making of the demand.

COMPULSORY DISCHARGE OR AMENDMENT OF REGISTRATION

50(1) In this section,

(a) "debtor" includes any person named in a registered financing statement as a debtor,

(b) "secured party" includes any person named in a registered financing statement as a secured party.

(2) Where a registration relates exclusively to a security interest in consumer goods, the secured party shall discharge the registration not later than 30 days after all obligations under the security agreement creating the security interest are performed, unless prior to the expiry of that 30 days period the registration lapses.

(3) Where a financing statement is registered and

(a) all of the obligations under the security agreement to which it relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the financing statement,

(c) the description of the collateral contained in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor or does not distinquish between original collateral and proceeds, or

(d) no security agreement exists between the secured party and the debtor,

the debtor or any person with an interest in property that falls within the collateral description on the financing statement may give a written demand to the secured party.

(4) The demand referred to in subsection (3) may require that the secured party register a financing change statement,

(a) in a case within subsections (3)(a) or (d), discharging the registration,

(b) in a case within subsection (3)(b), amending or discharging the registration, the case may be, so as to reflect the terms of the agreement, and

(c) in a case within subsection (3)(c), amending the collateral description to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor or to indentify items and kinds of property as original collateral or as proceeds ,

and the secured party shall register comply with the demand not later than 15 days after it is given.

(5) Where the secured party

(a) fails to comply with the demand referred to in sub section (3) within 15 days after it is given or

(b) does not give to the Registrar an order of the Court confirming that the registration need not be amended or discharged, the person giving the demand may register the financing change statement referred to in subsection (4) on providing to the Registrar satisfactory proof that the demand has been given to the secured party.

(6) The demand referred to in subsection (3) may be given in accordance with section 68 or by registered mail addressed to the secured party as it appears on the financing statement.

(7) On application to a court by the secured party, the court may order that the registration

(a) be maintained on any condition, and subject to section 44, for any period of time, or

(b) be discharged or amended.

(8) Subsection (5) does not apply to a registration of a security interest provided for in

(a) a security agreement registered under *The Corporation Securities Registration Act*, where the registration is continued under *The Personal Property Security Act* 1979-80, c. P-6.1 and under this Act, or

(b) a trust indenture if the financing statement through which the security interest was registered indicates that the security agreement providing for the security interest is a trust indenture.

(9) Where registration relates to a security interest referred to in subsection (8) and the secured party fails to amend or discharge the registration as required by subsection (4) the person making the demand may apply to a court for an order directing that the registration be amended or discharged.

(10) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand made under subsection (3), unless the charge has been agreed to by the parties before the making of the demand.

TRANSFER OF DEBTOR'S INTEREST IN COLLATERAL OR CHANGE OF DEBTOR'S NAME

51(1) Where a security interest has been perfected by registration and all or part of the debtor's interest in the collateral is transferred by the debtor with the prior consent of the secured party, the security interest in the transferred collateral is subordinate to

(a) an interest, other than a security interest in that collateral, arising during the period from the expiry of the 15th day after the transfer to the time the secured party amends the registration to disclose the name of the transferee of the interest in the collateral as the new debtor or takes possession of the collateral,

(b) a perfected security interest in the transferred collateral that is registered or perfected in the period referred to in clause (a), and

(c) a perfected security interest in the transferred collateral registered or perfected after the transfer and before the expiry of 15 days after the transfer if, before the expiry of the 15 days,

(i) the registration of the security interest first referred to in this subsection is not amended to disclose the transferee of the interest in the collateral as the new debtor, or

(ii) the secured party does not take possession of the collateral.

(2) Where a security interest is perfected by registration and the secured party has knowledge of

(a) information required to register a financing change statement disclosing the transferee as the new debtor, all or part of the debtor's interest in the collateral is transferred by the debtor, or

(b) the new name of the debtor, where there has been a change in the debtor's name,

the security interest in the transferred collateral, where paragraph (a) applies, and in the collateral where clause (b) applies, is subordinate to

(c) an interest, other than a security interest in that collateral, arising during the period from the expiry of the 15th day after the secured party has knowledge of the information referred to in clause (a) or the name of the debtor, as the case may be, to the time the secured party amends the registration to disclose the name of the transferee as the debtor, or to indicate the new name of the debtor, as the case may be, or takes possession of the collateral,

(d) a perfected security interest in that collateral registered or perfected in the period referred to in clause (c), or

(e) a perfected security interest in that collateral registered or perfected after the secured party has knowledge of the information referred to in clause (a) or the new name of the debtor, as the case may be, and before the expiry of the 15th day referred to in paragraph (c), if, before the expiry of the 15 days,

(i) the registration of the security interest first referred to in this subsection is not amended to disclose the transferee of the collateral as the new debtor or disclose the new name of the debtor, as the case may be, or

(ii) the secured party does not take possession of the collateral.

(3) This section does not have the effect of subordinating a prior security interest deemed by section 72 to be registered under this Act.

(4) Where the debtor's interest in part or all of the collateral is transferred by the debtor without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party acquires knowledge of the name of the most recent transferee, the secured party shall be deemed to have complied with subsection (2) if the secured party registers a financing change statement not later than 15 days after acquiring knowledge of

(a) the name of the most recent transferee who has possession of the collateral, and

(b) the information required to register a financing change statement,

and the secured party need not register financing change statement with respect to any intermediate transferee.

(5) This section does not apply to a registration made in a land titles office pursuant to section 49.

RECOVERY OF LOSS CAUSED BY ERROR IN REGISTRY

52(1) A person may bring action against the Government of Saskatchewan to recover loss or damage suffered by that person because of an error or omission in the operation of the Registry where the loss or damage resulted

(a) from reliance on a printed search result issued by the registry, or

(b) except as provided by sections 42(5) and 43(9), the failure of the Registrar to register a printed financing statement submitted for registration as provided in section 43.

(2) The Government of Saskatchewan is not liable either directly or vicariously for loss or damage suffered by a person because of

(a) verbal advice given by an agent or employee of the Province respecting this Act, regulations made under this Act or the operation of the Registry unless the person bringing the action proves that the agent or employee was not acting in good faith,

(b) failure to register or to register correctly electronic data transmitted to the Registry to effect a registration.

(3) No action for damage under this section or section 53 lies against the Government of Saskatchewan unless it is commenced not later than two years after the person entitled to bring the action first knew of the loss or damage, or

(a) in the case of an action brought under subsection (1)(a), ten years from the date the search result was issued, whichever is earlier,

(b) in the case of an action brought under subsection (1)(b), ten years from the date that the financing statement was submitted for registration, whichever is the earlier.

(4) Notwithstanding *The Proceedings Against the Crown Act*, no action may be brought against the Crown in the right of the Province, the Registrar or an officer of employee of the registry for any error or omission of the Registrar of an officer or employee of the registry in respect of the discharge or purported discharge of any duty or function under this Act or the regulations under this Act except as provided in this section and in section 53.

RECOVERY OF LOSS WHERE TRUST INDENTURES INVOLVED

53(1) An action for recovery of damages under section 52 brought by a trustee under a trust indenture or by a person with an interest in a trust indenture shall be brought on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for a subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the Government of Saskatchewan in respect of each error or omission.

(2) In an action brought by a trustee under a trust indenture or by a person with an interest in a trust indenture, proof that each person relied on the search result is not necessary if it is established that the trustee relied on the search result, but no person is entitled to recover damages under this section if the person knows at the time of acquisition of an interest in the collateral that the search result relied upon by the trustee is incorrect.

(3) In proceedings under this section, a court may make any order that it considers appropriate in order to give notice to the persons with interest in the same trust indenture.

(4) Subject to section 54(1), a court may order payment of all or a portion of the damages awarded to identified persons with interests in the same trust indenture at any time after judgment, and the obligation of the Government of Saskatchewan to satisfy the judgment is discharged to the extent that payment is so made.

PAYMENT OF CLAIM FOR LOSS

54(1) **The total amount recoverable in a single action under section 52, and the total amount recoverable for all claims in a single action under section 53 shall not exceed the amount prescribed.**

(2) **Where damages are paid to a claimant pursuant to section 52 or 53, the Government of Saskatchewan is subrogated to the rights of the claimant against any person indebted to the claimant whose debt to the claimant was the basis of the loss or damage in respect of which the claim was paid.**

(3) **Where the claimant recovers pursuant to section 52 or 53 an amount less than the value of the interest the claimant would have had if the error or omission had not occurred, the right of subrogation under subsection (2) does not prejudice the right of the claimant to recover in priority to the Government of Saskatchewan an amount equal to the difference between the amount paid to the claimant and the value of the interest the claimant would have had if the error or omission had not occurred.**

(4) **The Provincial Treasurer may, without action being brought, pay the amount of a claim against the Government of Saskatchewan when authorized to do so by the Minister responsible for this Act on the report of the Registrar setting forth the facts and the opinion of the Registrar that the claim is just and reasonable.**

(5) **When an award of damages has been made in favour of a claimant and the time for appeal has expired, or when an appeal is taken and it is disposed of in whole or in part in favour of the claimant, the Provincial Treasurer shall authorize payment out of the Consolidated Revenue of the Province, subject to subsection (1), the amount specified in the judgment in a manner specified in the judgment, including the costs of the claimant if the judgment so provides.**

PART V

RIGHTS AND REMEDIES ON DEFAULT

55(1) This Part does not apply to

(a) a transaction referred to in section 3(2),

(b) a transaction between a pledgor and a pawnbroker.

(2) The rights and remedies referred to in this Part are cumulative.

(3) In this section "secured party" includes a receiver.

(4) Subject to any other Act or rule of law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may

(a) proceed under this Part as to the personal property, or

(b) proceed as to both the land and the personal property in which case

(i) the secured party's rights, remedies and duties in respect of the land apply to the personal property with necessary modifications as if the personal property were land, and

(ii) this Part, other than section 56(4) to 56(7), does not apply.

(5) Subsection (4)(b) does not limit the rights of a secured party who has a security interest in the personal property taken before or after the security interest mentioned in subsection (4), and the secured party

(a) has standing in proceedings taken in accordance with subsection (4)(b) and,

(b) may apply to the court for the conduct of a judicially supervised sale under subsection (4)(b) and the court may grant the application.

(6) For the purpose of distributing the amount received from the sale of the land and personal property, where the purchase price is not allocated to the land and the personal property separately, the amount of the total price that is attributable to the sale of the personal property is that proportion of the total price that the market value of the personal property at the time of sale bears to the market value of the land and the personal property at the time of the sale.

(7) A security interest does not merge merely because a secured party has reduced the claim to judgment.

DETERMINATION OF RIGHTS AND REMEDIES ON DEFAULT

56(1) In this section,

"dependent of the debtor" means a person living with the debtor who depends wholly or substantially upon the debtor for financial support,

"secured party" includes a receiver.

(2) Where the debtor is in default under a security agreement

(a) except as provided by subsection (3), the secured party has against the debtor only

(i) the rights and remedies provided in the security agreement,

(ii) the rights, remedies and obligations provided in this Part and sections 36, 37 and 38, and

(iii) when in possession of the collateral, the rights remedies and obligations provided in section 17,

(b) the debtor has as against the secured party

(i) the rights and remedies provided in the security agreement,

(ii) the rights and remedies provided by any other Act or rule of law not inconsistent with this Act, and

(iii) the rights and remedies provided in this Part and in section 17.

(3) Except as provided in sections 17, 59. 60 and 62, no provision of this section, sections 17 or 58 to 63, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

(4) A debtor may claim as exempt from seizure the following items of collateral:

(a) household furnishings used by the debtor or a dependent of the debtor to the value of $5,000 or such greater amount as may be prescribed,

(b) health aids necessary to sustain health,

(c) a motor vehicle necessary for the proper and efficient conduct of the debtor's business, trade, calling or profession or for transportation to a place of employment when public transportation facilities are not reasonably available to convey the debtor to a place of employment,

(e) any item of consumer goods in the possession and use of the debtor or a dependent of the debtor which a court determines should not be seized because

(i) its loss would result in serious hardship to the debtor or dependent of the debtor, or

(ii) the costs of seizure and sale of the goods are dispropionate to their value.

(5) A dependent of the debtor may claim as exempt from seizure an item mentioned in subsections 4(a) and 4(e).

(6) When either a debtor or a dependent makes a claim under subsection (4)(a) or (4)(e)(i), a claim may not be made by the other with respect to an item of the same kind.

(7) Subclauses (4)(a)-(c) and subsection (5) do not apply to goods which are subject to a purchase money security interest held by the secured party against whom the claim to exemption is made by the debtor or dependent.

COMMENT

Sections 56(4)-(7) have been designed to displace sections 3, 5(2) and 6 of The Exemptions Act.

These sections provide for a slight increase in the value of household furnishings that can be claimed as exempt from seizure under a non-purchase money security interest. However, unlike the section 3 of The Exemptions Act they do not exempt tools and books since these are business assets and should not be exempt from seizure under a security agreement.

The motor vehicle exemption is expanded so as to reverse the effects of the decision in C.A.C. v. Laviolette (1983), 11 Sask. Rep. 122 (Sask.Q.B.) in which it was held that section 2(5) of The Exemptions Act does not apply to a motor vehicle of a day labourer who required it for transportation to his job outside city limits.

There is one conceptually new features in these provisions. A court is given power to refuse enforcement of a non-purchase money security interest in consumer goods when seizure of it would result in serious hardship to the debtor or a dependant or where the costs of seizure and disposition as such as to enforcement oeing little more than punative.

Under section 6 of The Exemptions Act dependents of the debtor are entitled to claim the exemption only upon the death of the debtor. There is no similar limitation in subsection 5.

As is the case under The Exemptions Act, collateral subject to purchase money security interests is not exempt from seizure.

These provisions do not affect sections 68-71 of The Saskatchewan Farm Security Act.

COLLECTION RIGHTS OF SECURED PARTY

57(1) **In this section "secured party" includes a receiver.**

(2) **In the event of default, a secured party is entitled**

(a) **to notify a debtor on an intangible or chattel paper or an obligor on an instrument or security to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification,**

(b) **subject to section 59, to take control of any proceeds to which the secured party is entitled under section 28,**

(c) **to apply any money, account, instrument or security in the form of a debt obligation taken as collateral to the satisfaction of the obligation secured by the security interest, and**

(3) **Where the collateral is a licence, the secured party may seize the collateral by notice to the board or statutory agency that issued the licence or the successor to such board or statutory agency.**

(4) **A secured party may deduct reasonable expenses of collection**

(a) **from amounts collected from a debtor on an intangible or chattel paper or an obligor under an instrument or security, or**

(b) **from money held as collateral.**

(5) A secured party who enforces a security interest in an intangible, security, chattel paper or instrument as provided in subsection (2)(a) or 2(c) shall give notice to the debtor not later than 15 days of doing so.

RIGHT TO ENFORCE SECURITY AGREEMENT AND SEIZURE OF A HOUSE TRAILER

58(1) **In this section,**

"house trailer" means a structure, whether ordinarily equipped with wheels or not that is

(a) designed to be moved from one point to another by being towed or carried and to provide living accommodation for one or more persons, and

(b) occupied as living quarters.

"secured party" includes a receiver.

(2) Subject to subsections (3)-(7) and sections 36, 37, 38 and 56, the *Bankruptcy and Insolvency Act* and any rule of common law requiring prior notice, on default on a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

(b) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate storage facilities are not readily available, the secured party may seize or repossess the collateral without removing it from the debtor's premises in any manner by which a sheriff acting under a writ of execution may seize without removal, if the secured party's interest is perfected by registration,

(c) where clause (b) applies, the secured party may dispose of collateral on the debtor's premises but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal,

(d) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and a method of enforcement that is available with respect to the document of title is also available, with all necessary modifications, with respect to the goods covered by it.

(3) Subject to subsection (4), no house trailer shall be seized or sold except by a sheriff.

(4) Subsection (3) does not apply if, after the secured party gives the notice mentioned in subsections (5) and (6), the house trailer is moved, without the written consent of the secured party, from its location at the time the notice was given.

(5) Not less than 30 days before instructing a sheriff to seize a house trailer, a secured party shall give a notice to

(a) the debtor, or

(b) if the debtor is not occupying the house trailer, any adult person occupying the house trailer.

(6) The notice referred to in subsection (5) shall contain

(a) the information set out in subsection 59(7)(a)-(f),

(b) a statement that unless the house trailer is redeemed or the security agreement is reinstated within 30 days from the date of delivery of the notice, it will be seized and disposed of, and

(c) a statement that if the house trailer is removed from the place where it is situated at the time of the giving of the notice without the written consent of the secured party, the trailer may be immediately seized by the secured party.

(7) Before seizing a house trailer, the sheriff

(a) shall require the secured party to execute and deliver to him a warrant in the prescribed form together with other documents specified by the sheriff,

(b) shall require proof that the notice required by subsections (5) and (6) was given,

(c) may require that the secured party provide such security as the sheriff considers sufficient to indemnify him in respect of his fees, expenses and anything done in relation to the seizure, including indemnification for claims by the debtor or any third party.

(8) Subsection (2)(b) applies to seizure of a house trailer by a sheriff.

(9) On making a seizure of a house trailer, the sheriff may surrender possession of it to the secured party or a person designated in writing by the secured party.

(10) A sheriff who has seized a house trailer shall release the seizure if the secured party authorizing the seizure does not take possession of it within 10 days from the date of being notified by the sheriff that he intends to surrender possession of the house trailer.

(11) The sheriff has no liability for loss or damage to the house trailer or for unlawful interference with the rights of the debtor or any other person who has rights in or to the property occurring after surrender of

possession as provided in subsection (9) or release of seizure as provided in subsection (10).

(12) A seizure referred to in subsection (3) shall not affect the interest of a person who under this Act or under any other law has priority over the rights of the secured party.

(13) The powers that a sheriff has under this section may be exercised by a person, other than the secured party or an agent of the secured party, apppointed by a sheriff.

COMMENT

Sections 58(3)-(13) have been designed to displace sections 6-6.4 of The Distress Act. These provisions maintain the public policy contained in The Distress Act under which a house trailer used as a home should not be seized without giving the debtor a prior opportunity to avoid seizure by redeeming or reinstating the contract. However there are differences between the proposed provisions and their counterparts in The Distress Act.

The system contemplated by the proposed provisions applies only to house trailers occupied by someone. The Distress Act applies to all house trailers whether occupied or not at the date of notice of seizure. Another important difference is that seizure can be effected by someone authorized by the sheriff, the sheriff cannot authorize the secured party to do the seizing. There is no similar restriction in The Distress Act.

The quasi-criminal penalty for moving the house trailer contained in The Distress Act has been eliminated. In its place is an immediate right to seize the house trailer.

The legal position of the sheriff is set out in much greater detail than in The Distress Act.

Section 63 of the Act will apply to seizures under this section with the result that a court is given wide powers to intervene to prevent hardship in appropriate cases.

Section 58(2) makes reference to pre-seizure notice requirements at the common law or in Equity. It is now an established rule of the Equity (the so-called rule in Lister v. Dunlop) that a secured party must demand performance and give reasonable a period of time thereafter to the debtor to meet the demand before the collateral is seized. While the rule has been applied in the context of The Personal Property Security Act by the Saskatchewan Court of Appeal in Bank of Nova Scotia v. Ham and Cahill, [1986] 5 W.W.R. 249 and Indian Head Credit Union Ltd. v. R & D Hardware Limited (1988), 66 Sask. R. 90 no judicial explanation has been given as to how the rule fits into the structure of Part V of the Act. Perhaps the best if not the only way to apply the rule in the context of the Act is to conclude that it is nothing more than an aspect of the secured party's statutory obligation to act in a commercially reasonable manner as required b section 64(1) of the current Act (and section 65(3) of the Act set out in this report). In some situations, commercial reasonableness requires that pre-seizure notice be given to the debtor. The basis of this, as stated by Estey J. in the judgment of the Supreme Court in Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. (1982). 135 D.L.R. (3d) 1 at p. 8, is that seizure without notice places the debtor in economic distress and, in some cases, results in serious damage to a business enterprise. Commercial reasonableness demands that these consequences be avoided if this can be done in such a way that the secured party's position is not placed in jeopardy.

Section 58(2) has been designed to provide express statutory authority for the application of the rule in Lister v. Dunlop in the context of Part V of the Act.

Section 58(2) also makes reference to a pre-seizure notice requirement contained in the Bankruptcy and Insolvency Act. Bill C-22, Third Session, Thirty-fourth Parliament, 40 Elizabeth II, 1991 provides for extensive amendments to the Bankruptcy Act including a change in the name of the Act. Section 244, a new provision added to the Act, requires that a secured party who intends to enforce any security on property of an insolvent person that is acquired for use in the business of the insolvent person

send to the insolvent person a notice in statutory form of that intention. The secured creditor may not enforce the security interest until at least ten days after sending the notice. While Bill C-22 had not yet been enacted into law when this report was being prepared, the best information available to the Commission indicated that it would be passed in 1992. The purpose of section 58(2) is to educate secured parties as the possible necessity of compliance with pre-seizue notice requirements of federal law.

DISPOSAL OF COLLATERAL ON DEFAULT

59(1) **In subsections (2), (5), (14) and (17), "secured party" includes a receiver.**

(2) **After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to**

(a) **the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and**

(b) **the satisfaction of the obligations secured by the security interest of the party making the disposition,**

and any surplus shall be dealt with in accordance with section 60.

(3) **Collateral may be disposed of**

(a) **by private sale,**

(b) **by public sale, including public auction or closed tender,**

(c) **as a whole or in commercial units or parts,**

(d) **if the security agreement so provides, by lease.**

(4) **Where the security agreement so provides, the payment for the collateral being disposed of may be deferred.**

(5) **The secured party may delay disposition of the collateral in whole or in part.**

(6) **Not less than 20 days prior to disposition of the collateral, the secured party shall give a notice to**

(a) the debtor or any other person who is known by the secured party to be an owner of the collateral,

(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party

(i) who has registered prior to the date that the notice of disposition is given to the debtor a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial numbered goods, or

(ii) whose security interest is perfected by possession at the time the secured party seized or repossessed the collateral, and

(c) any other person with an interest in the collateral who has given a written notice to the secured party of that person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(7) The notice referred to in subsection (6) shall contain

(a) a description of the collateral,

(b) the amount required to satisfy the obligation secured by the security interest,

(c) the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement, and a brief description of any default other than non-payment and the provision of the security agreement the breach of which resulted in the default,

(d) the amount of the applicable expenses referred to in subsection (2)(a) or, where the amount of the expenses has not been determined, a reasonable estimate,

(e) a statement that upon payment of the amount due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral,

(f) a statement that, on payment of the sums in arrears exclusive of the operation of any acceleration clause in the security agreement, or the curing of any other default, as the case may be, together with the amount due under subsection (2)(a), the debtor may reinstate the security agreement,

(g) a statement that unless the collateral is redeemed or the security agreement is reinstated, it will be disposed of and the debtor may be liable for a deficiency, and

(h) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted, or the date after which any private disposition of the collateral is to be made.

(8) Where the notice required in subsection (6) is given to a person other than the debtor, it need not contain the information specified in subsections (7)(c), (f) and (g), and where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in subsections (7)(c) and (f).

(9) A statement referred to in subsection (7)(g) shall not contain a reference to any liability on the part of the debtor to pay a deficiency if the secured party does not have the right to collect the deficiency from the debtor.

(10) Not less than 20 days prior to the disposition of the collateral, a receiver shall give a notice to

(a) the debtor, and where the debtor is a corporation, a director of the corporation,

(b) any other person who is known by the secured party to be an owner of the collateral,

(c) a person referred to in subsection (6)(b), and

(d) any other person with an interest in the collateral who has given a notice in writing to the receiver of that interest before the day notice of disposition is given to the debtor.

(11) The notice referred to in subsection (10) shall contain

(a) a description of the collateral,

(b) a statement that unless the collateral is redeemed it will be disposed of, and

(c) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted, or the date after which any private disposition of the collateral is to be made.

(12) The notice required in subsection (6) or (10) may be given in accordance with section 68 or where it is to be given to a person who has registered a financing statement, by registered mail addressed to the person to whom it is to be given as it appears on the financing statement.

(13) The secured party may purchase the collateral or any part of it only at a public sale as referred to in subsection (3)(b), and only for a price that bears a reasonable relationship to the market value of the collateral.

(14) When a secured party disposes of collateral to a purchaser who acquires the interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor,

(c) an interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are deemed to be performed for the purposes of sections 49 and 50.

(15) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or who is subrogated to the rights of the secured party has thereafter the rights and duties of the secured party, and the transfer of collateral is not a disposition of the collateral.

(16) The notice referred to in subsection (6) or (10) is not required where

(a) the collateral is perishable,

(b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of immediately after default,

(c) the cost of care and storage of the collateral is disproportionately large relative to its value,

(d) the collateral is of a type that is to be disposed of by sale on an organized market that handles large volumes of transactions between many different sellers and many different buyers,

(e) the collateral is money, other than a medium of exchange authorized by the Parliament of Canada, or

(f) for any other reason, a court on *ex parte* application is satisfied that a notice is not required,

(g) after default, each person entitled to receive a notice of disposition consents in writing to the disposition of the collateral without compliance with the notice requirements of subsection (6) or (10).

(17) The notice referred to in subsection (6) or (10) need not be delivered to a farmer where the security agreement is one to which sections 47-61 of *The Saskatchewan Farm Security Act* apply.

(18) Notwithstanding any other provision of this Part, where the collateral is a licence the collateral may be disposed only subject to the conditions and limitations prescribed in regulations pertaining to the licence or set by the board or statutory agency which issued the licence or by the successor to such board or agency.

SURPLUS OR DEFICIENCY

60(1) In this section,

"consumer goods" means goods acquired for use primarily by the buyer or by members of the buyer's family, for personal, household or family purposes,

"guarantor" means a person who lives with the buyer and who owns or who shares ownership or use of exigible property with him and who is a guarantor or indemnitor of the purchase price of the consumer goods,

"purchase price" includes credit charges, credit investigation charges, registration fees and all other charges payable by the buyer in connection with the purchase of the consumer goods,

"secured party" includes a receiver,

(2) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57, or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid in the following order to

(a) a person who has a subordinate security interest in the collateral

(i) who has registered prior to the distribution of the surplus a financing statement using the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial numbered goods, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person with an interest in the surplus, if that person has given a written notice thereof to the secured party prior to the distribution, and

(c) the debtor or any other person who is known by the secured party to be an owner of the collateral,

but the priority of claim of any person referred to in clauses (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

(3) The secured party shall give a written accounting of

(a) the amount received from the disposition of collateral or the amount collected under section 57,

(b) the manner in which the collateral was disposed of,

(c) the amount of expenses as provided in section 17, 57 and 59,

(d) the distribution of the amount received from the disposition or collection, and

(e) the amount of any surplus,

to a person referred to in subsection (2) within 30 days after receipt of a written request for an accounting.

(4) Where there is a question as to who is entitled to receive payment under subsection (2), the secured party may pay the surplus into court and the surplus shall not be paid out except upon an application under section 66 by a person claiming an entitlement to it.

(5) Except as provided in subsection (6) or in this or any other Act or unless otherwise agreed, the debtor is liable to pay to the secured party the deficiency.

(6) When consumer goods have been sold for a purchase price exceeding $500, or such greater amount as may be prescribed, and the seller has a purchase money security interest in the goods, the seller's rights upon default to recover from the buyer or guarantor

(a) any portion of the purchase price of the consumer goods,

(b) any amount payable under a guarantee of payment of the purchase price of the consumer goods given by a guarantor,

(c) damages for breach of the contract of sale, or

(d) any consideration promised by the buyer in return for a promise of the seller to forebear from seizing the goods or for extending the time for payment of amounts owing under the security agreement,

is limited to seizure and sale of the consumer goods in accordance with this Part.

(7) Nothing in subsection (6) shall preclude a right to enforce payment of an instrument payable on the date of the contract of sale or within 30 days thereafter given by the buyer or guarantor to the seller as payment or conditional payment of all or a portion of the purchase price of the consumer goods.

(8) Subsection (6) does not apply where

(a) the consumer goods are wilfully destroyed or damaged by an act of the buyer or a person in possession of the consumer goods with the consent of the buyer, or

(b) an order is made under section 56(4) prohibiting seizure of the consumer goods.

(9) A court may give judgment against the buyer or guarantor for all or any portion of the purchase price of the consumer goods or for damages where

(a) the consumer goods are destroyed or damaged other than as mentioned in subsection (8)(a),

(b) the consumer goods have been allowed to deteriorate to an extent greater than that which would be normally expected with respect to goods of that kind, or

(c) after the seizure of the consumer goods it is discovered that an accession which was collateral under the security agreement has been

removed and not replaced by other goods of equivalent value and free from any security interest having priority over that of the seller,

(d) the buyer or a person in possession of the consumer goods with the consent of the buyer has refused to disclose the location of the goods to the seller upon reasonable written request,

(e) the buyer has disposed of the consumer goods in violation of the security agreement,

(f) for any other reason it is inequitable that subsection (6) should apply.

(10) Subsection (6) does not apply to the sale of land and consumer goods upon an entire consideration.

(11) Sections 63(2)(c) and (d) do not apply to subsections (6)-(9) of this section.

COMMENT

Section 60(6)-(11) has been designed to displace section 18 of The Limitation of Civil Rights Act. Consideration should be given to amending section 46 of The Saskatchewan Farm Security Act so as to adopt the structure of these provisions.

Sections 60(6)-(11) applies only to purchase money security interests in "consumer goods" (as defined in section 2(h)) sold under secured instalment sales contracts where the price of the goods exceeds $500.00. The section also provides for an escalator mechanism so that the amount is not "frozen in time" and can be adjusted by regulation. Goods of a value less than $500 are rarely worth seizing and, consequently, it is unfair to require sellers to look only to the collateral as a source of repayment in the event of default by the debtor.

The section gives protection against deficiency claims to debtor and to spouse guarantors or indemnitors. This feature is designed to reverse the implication that may be taken from C.A.C. v. Hagan [1973] 6 W.W.R.172 (S.C.C.) that only buyers and not guarantors of the purchase price of the goods are protected by section 18 of The Limitation of Civil Rights Act. The policy of the section is to protect "family assets" from the consequences of an improvident purchase.

The section "codifies" the decision of the Saskatchewan Court of Appeal in Wunder v. Pabereznek [1938] 3 W.W.R. 733 in which the Court held that a forbearance to seize the collateral and extension of the time for payment is not new consideration sufficient to support a post-default promise by the buyer to pay.

In addition, the section "codifies" the decision of the Saskatchewan Court of Queen's Bench in Traves v. Manchur (1956) 26 W.W.R. 158, in which the Court held the section does not bar action on a cheque given as a down payment for the goods purchased.

The scope for a judge to order than a buyer or guarantor pay compensation to the seller in considerably widened in situations where it is unreasonable to limit the seller to his or her rights of seizure and disposition of the consumer goods.

RETENTION OF COLLATERAL IN SATISFACTION OF OBLIGATION

61(1) **After default, the secured party may propose to take the collateral in satisfaction of the obligation secured by it, and shall give notice of the proposal to**

(a) the debtor or any other person who is known by the secured party to be an owner of the collateral,

(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party

(i) who has registered prior to the date that the notice is given to the debtor a financing statement using the name of the debtor or according to serial number the collateral in the case of goods of a kind prescribed by the regulations as serial numbered goods, or

(ii) whose security interest is perfected by possession of the time of secured party seized or repossessed the collateral, and

(c) any other person with an interest in the collateral who has given a written notice to the secured party of that interest prior to the date that the notice is given to the debtor.

(2) If any person is entitled to a notice under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal, gives to the secured party a notice of objection within 15 days after the notice under subsection (1), the secured party shall dispose of the collateral under section 59.

(3) If no notice of objection is given, the secured party is, at the expiration of the 15 day period or periods referred to in subsection (2), deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interests of the debtor and from the interests of any person entitled to receive notice under

(a) subsection (1)(b) or

(b) subsection (1)(c) whose interest is subordinate to that of the secured party;

who has been given such notice, and all obligations secured by such interests are deemed performed for the purposes of sections 49 and 50.

(4) The notice required under subsection (1) may be given in accordance with section 68 or if it is to be given to a person who has registered a financing statement by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(5) The secured party may request that any person referred to in subsection (1), other than the debtor, furnish proof of that person's interest and, unless the person furnishes proof not later than 10 days after the secured party's request, the secured party may proceed as if no objection were received from the person.

(6) Upon application by a secured party, a court may determine that an objection to the proposal of a secured party is ineffective on the ground that

(a) the person made the objection for a purpose other than the protection of an interest in the collateral or proceeds of a disposition of the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) Where a secured party disposes of the collateral to a purchaser for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) any interest subordinate to that of the debtor,

(c) any interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interest are deemed to be performed for the purposes of section 49 and 50.

REDEMPTION AND REINSTATEMENT

62(1) At any time before the secured party or a receiver has disposed of the collateral or contracted for disposition under section 58 or 59 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61

(a) any person entitled to receive a notice of disposition under subsection 59(6) or (10) may, unless that person otherwise agrees in writing

after default, redeem the collateral by tendering fulfilment of the obligations secured by the collateral,

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party,

(b) more than twice in each year, if the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

SUPERVISORY POWER OF COURT

63(1) In this section "secured party" includes a receiver.

(2) On application by a debtor, a creditor of a debtor, a secured party, a sheriff or any person with an interest in the collateral, a court may

(a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37 and 38,

(b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37 and 38,

(c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37 and 38,

(d) stay enforcement of rights provided in this Part or sections 17, 36, 37 and 38,

(e) make any order necessary to ensure protection of the interests of any person in the collateral.

RECEIVERSHIPS

64(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, his rights and duties.

(2) In this section "Director" means the Director appointed pursuant to *The Business Corporations Act*.

(3) A receiver shall

(a) take custody and control of the collateral in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Director of Corporations of the appointment or discharge,

(c) open and maintain, in the receiver's name as receiver, one or more accounts at a bank, credit union or other institution licensed to accept deposits in the Province for the deposit of all money coming under the receiver's control as receiver,

(d) keep records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the appointment financial statements of the receivership administration,

(f) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that the receiver is acting as a receiver,

(g) on completion of the receiver's duties, prepare a final account of the administration and deliver a copy to the Director.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during

regular business hours at the place of business of the receiver in the Province.

(5) The debtor, and where the debtor is a corporation, a director of the debtor, sheriff, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final accounts referred to in subsection (2)(g) or to make them available for inspection during regular business hours at the place of business of the receiver in the Province.

(6) The receiver shall comply with the demand referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(7) The receiver may require the payment in advance of a fee in the amount prescribed for each demand, but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(8) Upon application by an interested person, a court may

(a) appoint a receiver,

(b) remove, replace or discharge a receiver, whether appointed by a court or pursuant to a security agreement,

(c) give directions on any matter relating to the duties of a receiver,

(d) approve the accounts and fix the remuneration of a receiver,

(e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed to make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve the person from any default or failure to comply with this Part,

(f) exercise with respect to receivers appointed pursuant to a security agreement the jurisdiction that it has over receivers appointed by the court.

(9) The powers referred to in subsection (7) and in section 63 are in addition to any other powers a court may exercise in its jurisdiction over receivers.

(10) Unless a court orders otherwise, a receiver is required to comply with section 59 and 60 only when the receiver disposes of the collateral other than in the course of operating the business of a debtor.

PROPER EXERCISE OF RIGHTS AND DUTIES

65(1) In this section, "secured party" includes a receiver.

(2) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

(3) All rights, duties, or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(4) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

(5) If a person, without reasonable excuse, fails to discharge any duties or obligations imposed upon the person by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

(6) Where a secured party, without reasonable excuse, fails to comply with obligations

(a) in subsection 43(11) or section 49 or 50, or

(b) in section 17, 18, 58(2), 58(3), 58(5), 59, 60 or 61 and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 43(11), 49 or 50, the person named as debtor in a financing statement or registration, is deemed to have suffered damages not less than the amount prescribed.

(7) Where a debtor or other person with an interest in land or collateral referred to in sections 49 or 50, respectively, without reasonable excuse, causes the Registrar of Land Titles or the Registrar to act as provided section 49(9) or 50(5), the secured party referred to in those sections is deemed to have suffered damages not less than the amount prescribed.

(8) In an action for a deficiency, the debtor may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 59 or 60, but non-compliance limits the right to the deficiency only to the extent that it has affected the ability of the debtor

to protect the debtor's interest in the collateral or has made the accurate determination of the deficiency impracticable.

(9) Where a secured party fails to comply with obligations in section 17, 18, 59 or 60, the onus is on the secured party to show that the failure

(a) where the collateral is consumer goods, did not affect the debtor's ability to protect the debtor's interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, and

(b) did not make the accurate determination of the deficiency impracticable.

(10) Except as otherwise provided in this Act, any provision in a security agreement or any other agreement that purports to exclude any duty or onus imposed by this Act, or that purports to limit the liability for or the amount of damages recoverable from a person who has failed to discharge any duty or obligation imposed by this Act is void.

COURT APPLICATIONS

66(1) On application of an interested person, a court may

(a) make an order determining questions of priority or entitlement to collateral, or

(b) direct an action to be brought or an issue to be tried.

(2) An appeal lies to the Court of Appeal from an order, judgment or direction of a court made under this Act.

EXTENSION OF TIME

67 Where in section 11 and in sections 36(14), 38(13) and 43(11) and Part V of this Act, a time is prescribed not later than or before which an act or thing must be done, a court, on application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance.

SERVICE OF NOTICES

68(1) A notice, demand, other than a demand under section 18, or copy of a financing statement or verification statement referred to in section 43(11) may be given

(a) to an individual, by leaving it with the individual or by sending it by registered mail addressed to

(i) the individual at the individual's residence, and

(ii) where the individual is the sole proprietor of a business, the name of the individual at the address of the business,

(b) to a partnership

(i) by leaving it with

(A) any one or more of the general partners, or

(B) any person having at the time of the delivery, control or management of the partnership business, or

(ii) by registered mail addressed to

(A) the partnership,

(B) any one or more of the general partners, or

(C) any person having at the time of the delivery control or management of the partnership business,

at the address of a partnership business,

(c) to a corporation, other than a municipality

(i) by leaving it with an officer or director of the corporation or person in charge of any office or place of business of the corporation,

(ii) by leaving it with or by sending it by registered mail addressed to the registered or head office of the corporation,

(iii) where the corporation has its registered or head office outside the Province, by leaving it with or by sending it by registered mail addressed to the attorney for the corporation,

(d) to a municipal corporation by leaving it at or by sending it by registered mail addressed to the principal office of the corporation or to the chief administrative officer of the corporation,

(e) to an association

(i) by leaving it with an officer of the association, or

(ii) by sending it by registered mail addressed to an officer of the association at the address of the officer, and

(f) to Her Majesty in the right of Saskatchewan as provided in *The Proceedings Against the Crown Act*.

(2) The giving of a document referred to in subsection (1) registered mail occurs

(a) when the addressee actually receives the notice or demand, or

(b) except in cases where the postal services are not functioning, on the expiration of ten days after the date of registration, whichever is earlier.

CONFLICT WITH OTHER LEGISLATION

69(1) If there is a conflict between a provision of this Act and a provision of *The Agricultural Implements Act*, or *The Saskatchewan Farm Security Act* or a provision for the protection of consumers in any other Act, the provision of that Act prevails.

(2) Except as otherwise provided in this or any other Act, where there is a conflict between a provision of this Act and a provision of any other Act other than those referred to in subsection (1), the provision of this Act prevails.

REFERENCE TO PREVIOUS LEGISLATION AND TERMINOLOGY

70(1) A reference in any Act, regulation or writing to *The Assignment of Book Debts Act*, *The Bills of Sale Act*, *The Conditional Sales Act*, or *The Corporation Securities Registration Act* that relates to a security interest is deemed to be a reference to this Act or of the corresponding provision of this Act.

(2) A reference in any Act, regulation, or writing to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge or assignment of book debts or the like, or any derivative of these forms, is deemed to be a reference to the corresponding kind of security agreement under this Act.

TRANSITION

TRANSITIONAL APPLICATION OF ACT

71(1) In this section and section 72,

(a) "prereform law" means law in force immediately before the coming into force of "prior law".

(b) "prior law" means law in force immediately before the coming into force of this Act.

(c) "prior security interest" means

(i) a security interest as defined in *The Personal Property Security Act* R.S.S. 1978, c. P-6.1 and to which that Act applied, and

(ii) an interest created, reserved or provided for by a valid security agreement or other transaction made before this Act comes into force that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was entered into.

(2) Subject to subsections (9) and (10), nothing in this Act affects the continued validity and enforceability under prior law of a prior security interest that is not a security interest under this Act.

(3) Except as herein provided, this Act applies

(a) to every security agreement made after this Act comes into force, including an agreement that renews, extends, or consolidates an agreement made before this Act comes into force, and

(b) to every security agreement made before this Act comes into force that has not been validly terminated in accordance with prereform law or prior law before this Act comes into force, and

(c) subject to subsection (5), to every prior security interest that is not enforced or otherwise validly terminated in accordance with prereform law or prior law before this Act comes into force,

(e) to a receiver appointed before or after this section comes into force.

(4) Sections 10 and 11 do not apply to a security agreement referred to in subsection (3)(b).

(5) **Except as provided in subsections (6), (7), (8) and (10) this Act does not apply to a prior security interest that is not a security interest under this Act.**

(6) **The validity of a prior security interest is governed by the law in force when the security interest was created.**

(7) **The order of priorities**

(a) **between prior security interests is determined by pre reform law if all the competing security interests arose under security agreements entered into before prior law came into force or this Act comes into force, and**

(b) **between a prior security interest and the interest of a third party is determined by prereform law, if the third party interest arose before this Act comes into force and the security interest arose under a security agreement entered into before prior law came into force.**

(8) **Subject to subsection (7), the order of priorities**

(a) **between prior security interests is determined by prior law, and**

(b) **between a prior security interest and the interest of a third party is determined by prior law, if the third party interest arose before this Act comes into force.**

(9) **The order of priorities between**

(a) **an interest arising after this Act comes into force and a prior security interest that is a security interest pursuant to this Act is determined by this Act, and**

(b) **between an interest arising after this Act comes into force and the interest of a third party arising before this Act comes into force is determined by this Act.**

(10) **The order of priorities between an interest arising after this Act comes into force and a prior security interest that is not a security interest under this Act is determined by this Act as would be the case if the prior security interest were within the scope of this Act.**

(11) **Subsections (9) and (10) do not apply where the prior security interest is**

(a) **a lease for a term of more than one year of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land.**

(b) an assignment of rental payments payable under a lease of real property.

(12) Notwithstanding the repeal of prereform law or prior law, this law continues in force, as if it had not been repealed, to the extent necessary to give effect to this section and section 72.

TRANSITIONAL PERFECTION OF PRIOR SECURITY INTERESTS

72(1) In this section, "prior registration law" means

(a) the *The Corporation Securities Registration Act* as it existed before the coming into force of *The Personal Property Security Act*, R.S.S. 1978, c. P-6.1 and

(b) *The Personal Property Security Act*, R.S.S. 1978, c. P-6.1 and it existed immediately before the coming into force of this Act.

(2) Except as otherwise provided in this section, a prior security interest that, when this Act comes into force, is covered by an unexpired filing or registration under prior registration law is deemed to have been registered and perfected under this Act and, subject to this Act, the registered and perfected status of such interest continues for the unexpired portion of the filing or registration, as the case may be, and may be further continued by registration under this Act if

(a) the prior security interest could have been perfected by registration if it had arisen after this Act came into force, or

(b) the prior security interest is a security interest referred to which section 71(10) applies.

(3) A prior security interest is covered by an unexpired filing or registration under prior law within the meaning of subsection (2) where the requirements for perfection of the security interest under prior law have been met, whether or not the requirements for perfection of the security interest under this Act have been met.

(4) For the purposes of subsection (3), the requirement for perfection of a security interest are met when the security interest has the status in relation to the interest of other secured parties, buyers, judgment creditors or the trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

(5) A registration of a prior security interest that, when this Act comes into force, has not expired under prior registration law, is deemed to continue

for the purposes of prior registration law for the unexpired portion of the registration period, and may be further continued by registration under this Act.

(6) A prior perfected security interest in crops is deemed to be registered in accordance with section 49 as of the date this Act comes into force and such registration continues for a six months after this Act comes into force and may thereafter be continued by registration in accordance with section 49.

(7) A prior security interest in an instrument in the form of a letter of credit or advice of credit that is perfected by registration that continues after this Act comes into force is deemed to be perfected by possession in accordance with section 24 for a period of six months from the date this Act comes into force, and thereafter the security interest is perfected by possession only when the secured party has taken actual possession of it in accordance with section 24.

(8) A prior security interest in accounts arising out of the provision of professional services or a security interest in a claim for damages or a judgment representing a right to damages, other than a right to damages in tort

(a) is deemed to be perfected for the purposes of sections 20(a) and (b), and

(b) is deemed to be perfected for all other purposes as of the date such interest was perfected under the law applicable at the time of its creation and that perfection continues for one year from the date this Act comes into force, and thereafter it becomes unperfected unless it is otherwise perfected under this Act.

(9) For the purposes of subsection (8), a security interest was perfected under the applicable law when the secured party has complied with the law with respect to the creation and continuance of the security interest and the security interest has the status in relation to the interest of other secured parties and buyers similar to that of an equivalent security interest created and perfected under this Act.

(10) A prior security interest that, when this Act comes into force, could have been, but was not

(a) filed or registered under prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party,

may, if it is a security interest that could have been perfected by registration or possession under this Act if it had arisen after this Act comes into force, may be perfected by registration or possession in accordance with this Act.

(11) Section 7(3), to the extent that it requires registration in the jurisdiction where the transferee of the collateral is located, does not apply to a security interest created before this Act comes into force.

REGULATIONS

73 The Lieutenant Governor in Council may make regulations

(a) prescribing the kinds of goods the leases of which are not within the scope of the Act,

(b) prescribing what constitutes a licence for the purposes of section 2(1)(w).

(c) prescribing the duties of the Registrar,

(d) respecting the registry, including

(i) the location and hours for the offices of the registry or any of them, and

(ii) the transition from any prior registry system to the system established by this Act,

(e) requiring the payment of fees and prescribing the amount of the fees and the manner of payment of them,

(f) prescribing the time, place and all other matters pertaining to the registration of documents and electronic data that may or are required to be registered under this Act,

(g) prescribing

(i) the form, content and manner of use of financing statements and financing change statements to be used to register security interest under this Act,

(ii) the form, content and manner of use of notices referred to in this Act, including notices registered under section 49 in a land titles office,

(iii) the manner in which collateral, including proceeds collateral, is to be described in financing statements and prescribing what kinds of goods may be described in part by serial number and what kinds of goods must be described in part by serial number,

(h) prescribing the time, place and all other matters pertaining to searches of the registry and the method of disclosure of registered information including the form of a search result,

(i) requiring or permitting the use of printed or electronic verification statements to confirm the registration of information on financing statements and financing change statements,

(j) permitting the Registrar to amend a registration that contains an error caused by the act of the Registrar or registry employees and prescribing the limits of the amendments,

(k) prescribing abbreviations, expansions or symbols that may be used in a financing statement, financing change statement or other form, notice or document used in connection with the registration of security interests or the disclosure of information in the registry,

(l) prescribing the length of time during which a registration is to be effective and the manner in which the period of time is to be indicated,

(m) prescribing the maximum amounts of compensation payable or recoverable under section 52 to 54,

(n) defining any word or expression used in this Act that is required to be defined for the purposes of the regulations,

(o) authorizing the Registrar to make arrangements providing for the deferred payment of fees and charges and prescribing conditions that must be met if the arrangements are to be made available or continue to be made available to particular persons,

(q) prescribing the amount of any charge to which a secured party or person named as a secured party in a financing statement is entitled under sections 18 and 64,

(r) prescribing the amount of damages payable by a secured party under section 65,

(s) prescribing any matter required or authorized by this Act to be prescribed by regulation.

CROWN BOUND

74 The Crown is bound by this Act.

75 This Act comes into force on proclamation.